IN THE

Supreme Court of the United States

October Term, 1942.

No. 379

TITLE INSURANCE AND TRUST COMPANY, a corporation,
Petitioner,

vs.

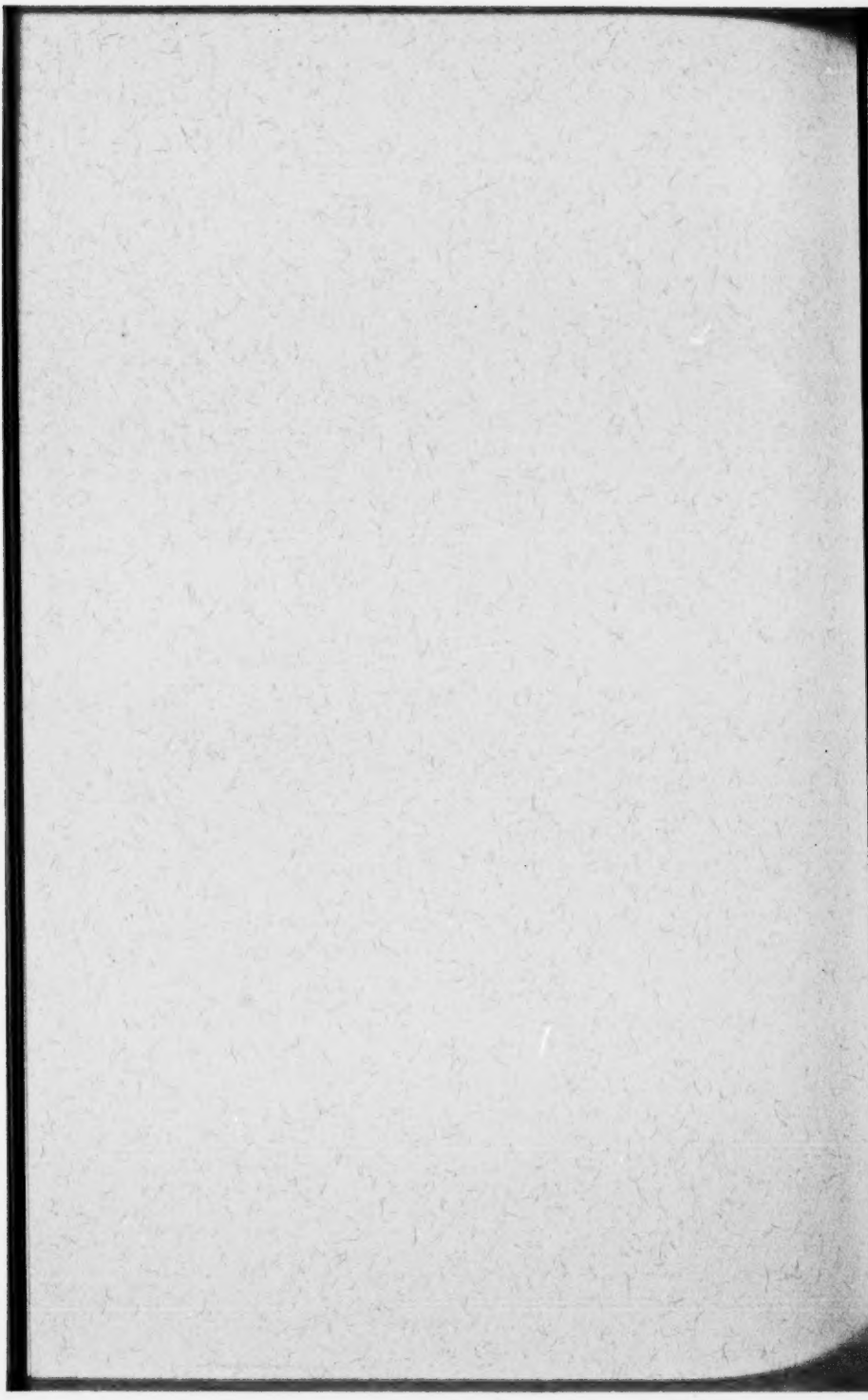
HARRY C. MABRY, as Executor of the Last Will and Testament of William J. Garland, Deceased, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE, AND SUPPORTING BRIEF.

LOUIS W. MYERS,
PIERCE WORKS,
900 Title Insurance Building, Los Angeles,
Counsel for Petitioner.

O'MELVENY & MYERS,
WILLIAM B. CARMAN, JR.,
JACKSON W. CHANCE,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles



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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE.

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Title Insurance and Trust Company, a corporation, respectfully petitions that a writ of certiorari issue to review the final judgment of the District Court of Appeal of the State of California, Second Appellate District, Division One, in that certain cause therein entitled "Harry C. Mabry, as Executor of the Last Will and Testament of William J. Garland, Deceased, Plaintiff and Respondent, v. Alzoa Scott, *et al.*, Defendants and Respondents, Title Insurance and Trust Company, a corporation, Defendant

and Appellant," being therein numbered Second Civil No. 13,263. Said judgment was entered by said District Court of Appeal April 15, 1942. R. 611. In accord with the provisions of the California Constitution, a petition for hearing in the Supreme Court of California was duly and timely filed with said Supreme Court May 23, 1942, R. 597, and said petition was denied by said Supreme Court June 12, 1942. R. 612. Said District Court of Appeal is the highest court of the state in which a decision of the suit or federal question herein presented could be had, in view of the denial of said petition by said Supreme Court.*

Opinion Below.

The opinion of the District Court of Appeal of the State of California in this cause is reported at 51 Adv. Cal. App. 379, and at 124 Pac. (2d) 659, and is set forth in full herein at R. 598.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937. A right and immunity was and is specially claimed by petitioner under the Constitution of the United States. Petitioner claimed in the state courts and claims here a right and immunity under the Fourteenth Amendment to the United States Constitution namely, that the judgment rendered by the State Court, ordering petitioner, as trustee,

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*California Constitution, Art. VI, §§ 1, 4, 4-a, 4-b, 4-c (Calif. Stats. 1929, XX-XXIV). See Appendix.

American Railway Express Company v. Levee (1923), 263 U. S. 19, 20-21.

to pay $120,000 out of the corpus of a trust, which corpus belonged entirely to unborn and unascertained remaindermen who were not before the court, actually or by virtual representatives, and who therefore, were not and could not be bound by the judgment in this case, would be and was violative of the due process guaranties of said Fourteenth Amendment. This claim was denied by the District Court of Appeal of the State of California. R. 603, 611.

This petition is made pursuant to paragraph 5(a) of Rule 38 of the Rules of this Court, which provides for the granting of a writ of certiorari where a state court has decided a Federal question of substance probably in a way not in accord with the applicable decisions of this Court. Petitioner, in seeking this review, relies, among other decisions, on the recent decisions of this Court in *Hansberry v. Lee* (1940), 311 U. S. 32, and *Riley v. New York Trust Co.,* ..... U. S. ....., 86 L. ed. 551, 558. (Concurring opinion.)

The case sought to be reviewed herein involves a decision of an important question of law relating to the application of the doctrine of virtual representation to a purported "compromise" of litigation between living beneficiaries of a trust wherein the validity of the trust was attacked. By said "compromise" a large part of the corpus ($120,000) belonging entirely to unascertained and absent remaindermen, is ordered to be paid by petitioner presently to certain of the life beneficiaries, who are seeking the enforcement of said "compromise." The decision of the District Court of Appeal below is probably in conflict with the decision of this Court in *Hansberry v. Lee, supra.*

Questions Presented.

1. Consistent with due process of law, may the interests of unborn or presently unidentified remaindermen be adversely affected by a decree approving an agreement for compromise of pending litigation attacking a trust, which agreement provides for the withdrawal of $120,000 from the corpus, belonging solely to such remaindermen, and the immediate payment thereof to certain of the living income beneficiaries, where the interests of such remaindermen are not before the court, either actually or through representation?

2. Consistent with due process of law, in a proceeding for court approval of such "compromise" agreement, could the absent remaindermen be virtually represented by the living income beneficiaries who had no possible interest in the corpus and each of whom reasonably expected to gain largely through the "compromise" at the expense of the absent remaindermen?

3. Consistent with due process of law, could said absent remaindermen be represented in said proceeding by a purported "guardian *ad litem*" selected by the plaintiff in the action and purportedly appointed by an *ex parte* order made without notice to any one, where the interests of said remaindermen were not subjected to the jurisdiction of the court by any other means?*

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*Under California statutes guardians *ad litem* can be appointed for minors or incompetents only after such minors or incompetents have been first duly served with process. *Akley v. Bassett*, (1922), 189 Cal. 625. The sole exception to this rule is in a proceeding *in rem* for the registration of title to land under the Torrens Land Law, where there has first been a "seizure" of the *res* by the filing and recording of a *lis pendens*. The Article in question (Deering's Genl. Laws, Calif. Art. 8589, §13) provides as follows:

Continued on following page—

4. Consistent with due process of law, were said absent remaindermen adequately represented in said proceeding by the presence of the Trustee, where the interests of each class of the living beneficiaries were opposed to and in conflict with the interests of all the other living beneficiaries, and the interests of all the living beneficiaries were opposed to and in conflict with the interests of all of the absent remaindermen?

On the other hand, if the Trustee should be held to have represented the remaindermen, did not its refusal to consent to the "compromise" deprive the court of authority to approve same?

Summary Statement of Matter Involved.

William J. Garland, now deceased, created the trust in question in 1931. R. 91. As of the date of the compromise proceedings in 1939, the trust corpus had a value of approximately $1,200,000. R. 537. The income beneficiaries were Alzoa (Garland) Scott, Garland's then wife, entitled to an income of $1,250 for life; the four minor children of their marriage, entitled to income (payable to Alzoa for their benefit) on a sliding scale of from $500 per month to $1,250 per month, for a period of twenty years only; and, lastly, Garland, the settlor, entitled to any balance of the income for life with remainder therein to the issue of Garland and Alzoa *per stirpes*. R. 75-78.

—Continued from previous page

"*Appointment of Guardians:* * * * Upon the petition of applicant or of any person interested in the proceedings, the court shall appoint a disinterested person to act as guardian *ad litem* for minors and other persons under disability and for all persons not in being who may appear to have any interest in or lien upon the land. * * *"

The trust was to terminate upon the death of the survivor of Garland, Alzoa and the four children. R. 80-81. Thereupon the corpus was to be distributed (a) to the then issue of Garland and Alzoa, *i. e., unborn grandchildren,* and surviving spouses of such issue, or (b) in default thereof, to the heirs at law of Garland under the laws of California then in effect. R. 81-82.

No person now living or ascertained has any interest in the corpus of this trust.

In 1936, Garland sued (*inter alia*), Alzoa, the four children, and this petitioner, as trustee, to set aside the trust on the ground of asserted misrepresentations by Alzoa. R. 98. These allegations were denied by all defendants. R. 175; 295.

In 1938 Garland amended his complaint, and, in the alternative, prayed that the trust instrument be "revised, modified and reformed" on the ground of mistake in the very particulars in which the trust was later ostensibly modified as a result of the "compromise." R. 337. The allegations of the amendment were denied by all defendants. R. 394; 408; 415.

In August, 1939, a petition to compromise the action was filed. R. 540. Said petition alleged that a written agreement had been entered into between Garland and Alzoa. R. 550. Abandoning their defenses to plaintiff's claims, all the living beneficiaries joined in the petition to compromise, thus aligning themselves with the plaintiff as against the interests of the unborn, and joined in the petition. R. 540-541. In addition, Garland petitioned the Court for the appointment of a guardian *ad litem* for the unborn grandchildren and an order purporting to appoint such guardian *ad litem* was entered *ex parte*. R. 574; 578.

This petitioner, as trustee, has at all times refused to join in or consent to said compromise. R. 566; 533-534.

The effect of the "compromise" was to give plaintiff the full relief prayed for in his amendment to the complaint.

The features of the modification of the trust contemplated by the compromise [R. 550-553] were as follows:

1. $60,000 of the corpus (property of the unascertained remaindermen) was forthwith to be paid out to Garland;
2. A like $60,000 out of corpus was to be paid over to Alzoa;
3. In lieu of $1,250 per month to Alzoa, she was to receive 37½% of the net income for life with remainder over to the four minor children;
4. In lieu of a graduated scale of income for the benefit of the four children for a period of twenty years (less than twelve years of which remained), the compromise secured to them a vested interest outright in 25% of the net income of the trust for their respective lives, with remainder over to their issue.
5. In lieu of rights during his life to the balance of income after Alzoa and the children, Garland, the settlor, was to receive 37½% of the net income of the trust for himself or his assigns during the entire term of the trust, probably about sixty years.

Otherwise the original provisions of the trust were left undisturbed. R. 550-551.

Believing that the interests of the unrepresented unborn were being vitally and substantially affected by the diversion of $120,000 of corpus to the settlor and the living beneficiaries, petitioner as trustee, not only in order to oppose the imposition upon it of a personal liability through a void judgment but also as a matter of duty to absent beneficiaries (*Gray v. Union Trust Co.*, 171 Cal. 637, 639), appeared and opposed [R. 566] and has continued to oppose the proposed settlement and to contest the Court's power to order the trustee to make payments out of corpus as provided thereby.

After hearing and argument, the trial court approved the compromise and entered its decree authorizing the same and directing the trustee to pay out said $120,000. R. 516. Thereupon petitioner, trustee, took its appeal. R. 533-534. The District Court of Appeal rendered its decision affirming the order of the trial court. R. 598, 611. Thereafter petitioner applied to the Supreme Court of the State of California for a hearing after decision by the District Court of Appeal, which was denied. R. 612. In the trial court, in the District Court of Appeal and on petition in the Supreme Court, petitioner has raised the federal constitutional question at each stage of the case. The opinion of the District Court of Appeal expressly passes upon that question. R. 603.

Specification of Errors.

The District Court of Appeal erred:

1. In holding that the unborn and unascertained remaindermen were virtually represented by the life beneficiaries who received substantial benefits from the compromise agreement at the expense of those claimed to be represented.

2. In holding (if it did so hold) that petitioner, as trustee, represented the unborn and unascertained remaindermen even though the trustee refused at all times to consent to the compromise.

3. In holding (if it did so hold) that a so-called "guardian *ad litem*" for the unborn and unascertained remaindermen, appointed *ex parte* and without statutory or other authority therefor upon the petition of the plaintiff, William J. Garland, in the rescission and reformation suit (wherein said plaintiff was the instigator of and a party to said compromise agreement and was one of the petitioners seeking the approval thereof), was the representative of the unborn and unascertained remaindermen with authority to bind them to this compromise agreement.

4. In holding that the doctrine of virtual representation may be applied, consistently with due process of law, to a "compromise" of pending litigation (rather than a *defense* of such litigation) where the compromise involves the withdrawal of $120,000 of corpus belonging to those claimed to be virtually represented and which sum is to be given immediately to certain of the parties seeking to enforce the compromise.

Reasons for Granting the Writ.

1. The decision of the District Court of Appeal, holding that the unascertained remaindermen are bound by the compromise under the doctrine of virtual representation, despite the adverse interests of those claimed to be the representatives, is in conflict with decisions of this Honorable Court on that subject.

2. The decision of the District Court of Appeal is not consistent with, and does not afford either the unascertained remaindermen or this petitioner the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner respectfully represents that said questions properly appear in the record and were raised before the trial court and the District Court of Appeal and involve questions of great importance in the proper administration of trust law.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the Seal of this Honorable Court directed to the District Court of Appeal of the State of California requiring said court to certify and send to this Court a full and complete transcript of the record and of the procedings in said District Court of Appeal in the case numbered Second Civil No. 13,263 and entitled "Harry C. Mabry, as Executor of the Last Will and Testament of William J. Garland, Deceased, Plaintiff and Respondent, v. Alzoa Scott *et al.*, Defendants and Respondents, Title Insurance and Trust

Company, a corporation, Defendant and Appellant," to be reviewed and determined by this Honorable Court as provided by law; that the judgment of said District Court of Appeal herein be reversed by this Honorable Court; and for such further relief as to this Court may seem proper.

Dated: September 3, 1942.

LOUIS W. MYERS,
PIERCE WORKS,
Counsel for Petitioner.

O'MELVENY & MYERS,
WILLIAM B. CARMAN, JR.,
JACKSON W. CHANCE,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Summary of Argument.

1. The procedure and course of litigation adopted by the state courts do not satisfy the requirements of due process of law. (*Hansberry v. Lee* (1940), 311 U. S. 32, at 44; *Riley v. N. Y. Trust Co.*, ... U. S. ....., 86 L. ed. 551, 558.)

2. Due process of law requires that the interests of the beneficiaries of a trust be not adversely affected by a court decree unless such beneficiaries be actually or constructively before the court.

3. Where such beneficiaries are unborn or unascertained, their interests cannot be adversely affected by a court decree unless subjected to the court's jurisdiction through the application of principles of virtual representation.

4. Virtual representation requires similarity of motive and inducement between representative and represented.

5. In this case, the alleged representatives, respectively (other than the so-called guardian *ad litem*), obtain personal benefits from the "compromise" at the expense of the unborn. There is, therefore, a lack of similarity of motive and inducement between these alleged representatives and the represented.

6. As an independent proposition, consistently with due process, the living may represent the unborn only in adversary proceedings, not in contractual dealings.

7. The decision of the District Court of Appeal affirming the judgment of the trial court ordering the trustee to comply with the "compromise," modifying the trust and ordering immediate payment of $120,000 of corpus, is a void judgment, lacks the necessary jurisdiction and denies due process of law to the unascertained remaindermen and petitioner, as trustee.

8. Petitioner as trustee is directly affected by such lack of due process.

II.

ARGUMENT.

1. The Procedure and Course of Litigation Adopted by the State Court Do Not Satisfy the Requirements of Due Process of Law.

Where the judgment of a state court, claimed to bind absent parties on the doctrine of virtual representation, is challenged for want of due process, this Honorable Court will examine the course of procedure to ascertain whether those absent parties, whose rights have thus been assertedly adjudicated, have been afforded such notice and opportunity to be heard as are requisite to due process which the Constitution prescribes. (*Hansberry v. Lee, supra,* at p. 40.) This Court will examine to ascertain whether the procedure devised and applied by the state court is such as to insure that those parties present are of the same class and of the same interest as those absent, and that the litigation is so conducted as to insure a full and fair consideration of the common issue. (*Hansberry v. Lee, supra,* at p. 43.) Where the procedure and course of litigation adopted by the state courts do not satisfy these requirements of due process, this Court will set aside the state court judgment. (*Hansberry v. Lee, supra,* at p. 44; *Riley v. N. Y. Trust Co.,* ..... U. S. ....., 86 L. ed. 551, 558.)

2. Due Process of Law Requires That the Interests of the Beneficiaries of the Trust Be Not Adversely Affected by a Court Decree Unless Such Beneficiaries Be Actually or Constructively Before the Court.

It is, of course, fundamental that no rights or interests can be destroyed or adversely affected unless the owner of such rights be given his day in court. Any different holding would be violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

> *Pennoyer v. Neff* (1877), 5 Otto (95 U. S.) 714; *Hansberry v. Lee, supra,* at p. 40.

There is no exception to this principle where the interests are owned by unborn or unascertained beneficiaries. Those interests can no more be destroyed constitutionally without a day in court than those of the living.

> *McArthur v. Scott* (1884), 113 U. S. 340, at 391-392, 393-395.

3. Where Such Beneficiaries Are Unborn or Unascertained, Their Interests Cannot Be Adversely Affected Unless Subjected to the Court's Jurisdiction Through the Application of Principles of Virtual Representation.

The rule is that when justiciable issues are presented to a court, affecting the interests of unborn and unascertained persons, and there are living parties before the court whose interests are so substantially identical in quality and quantity and are adversely affected by the proceedings in so similar a manner to those unborn and unascertained that they have the same stimulus to act

in the treatment of their interests as would such unborn or unascertained persons, then, and only then, can the interests of the unborn or unascertained be bound by the court decree.

See:

Hansberry v. Lee, supra, at pp. 41, 43, 44;

McArthur v. Scott, supra, at p. 394;

Note 120, *A. L. R.* 876;

F. C. Roberts, *"Virtual Representation in Actions Affecting Future Interests"* (1936), 30 Ill. L. Rev. 580-581.

4. Virtual Representation Requires Similarity of Motive and Inducement Between Representative and Represented.

The essential element in every case involving virtual representation is that the motive and inducement between the representative and represented must be identical or substantially similar. There are numerous cases in which decrees entered years before have been held entirely void because the persons purportedly representing the unborn have had interests dissimilar to theirs. (See *McArthur v. Scott, supra,* where this Honorable Court in 1884 held void a decree entered in 1839, thus affecting all titles to property depending upon the former decree for almost fifty years.)

In *Hansberry v. Lee, supra,* this Honorable Court, at page 45, held that representation by persons "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

5. No Such Similarity Was Present in This Case Between Those Claimed to Be Virtual Representatives and the Unborn and Absent Remaindermen.

In view of the foregoing established principles of constitutional law, it is necessary to examine the relationships of each of the persons claimed in this case and found by the court below to be the representatives of the unascertained and absent remaindermen.

The only living actual or potential beneficiaries of the trust were William Garland, Alzoa, the four minor children and Garland's then wife and daughter who would have been his heirs at law had he then been deceased. R. 542-543. These were all parties to the litigation, and all joined in the petition for compromise. R. 540-541. As far as the settlor and the so-called "presumptive heirs" are concerned, it was conceded below by all parties that they had interests definitely adverse to the remaindermen and could not represent them. R. 605. This leaves only Alzoa, the four minor children and (assertedly) the trustee, as possible virtual representatives.

(a) Alzoa Was Adversely Interested and Could Not Represent the Absent Remaindermen.

Alzoa, like the settlor, *is to receive outright the sum of $60,000 from that corpus to which she had not the remotest interest under the trust.* In addition, she receives 37½% of the income for her life, in lieu of the sum of $1,250 per month awarded to her by the trust provisions. Should the trust produce an average return of four per cent per annum, a modest expectation over a long period of years, Alzoa would be far ahead on payments of income alone. The dissimilarity of interest between Alzoa and

the remaindermen as to the advisability of the compromise is conclusively apparent. Her gain by the compromise was, as to *corpus*, precisely the same, $60,000, as that of the *plaintiff*. As to income, the result was that both Alzoa and the *plaintiff* were to receive 37½%. The plaintiff was concededly disqualified as a virtual representative. Since they each raided the interest of the unborn to an equal extent, Alzoa's disqualification is equally obvious.

(b) The Four Minor Children Were Adversely Interested and Could Not Represent the Unborn and Absent Remaindermen.

The District Court of Appeal rested its determination that the unborn remaindermen were bound by the doctrine of virtual representation, in the main, by the consent to the compromise of the four minor children. In so holding, the District Court of Appeal demonstrated, we submit, that it did not give proper consideration to the fundamental requirement that representation can only exist where *similar inducements* can fairly be expected to motivate the representative and the represented. It is not sufficient that the parties have no direct hostility toward each other. *It is imperative that they must have the same impelling reasons for acting.*

Under the original trust it was provided that certain specific monthly payments, ranging from $500 per month during the first five years, to $1250 per month for the fourth five years, were to be paid to Alzoa for the support and maintenance of these minors, the eldest of whom was eight years old at the time the trust was established. After the end of that twenty-year period *no payments of any kind* were to be made from the trust to or for the benefit of these children, *until the death of William Garland, whenever that might be.*

At the time the petition for compromise was filed less than twelve years remained of this twenty-year period; whereas Mr. Garland then had a normal life expectancy of about *twenty-five years*. Consequently, the four minors were faced with a period of thirteen years during which they were to receive no income whatever.* While that period might be shortened by Garland's earlier death, it might, with equal reasonableness, be very much longer, should he live past his expectancy. In the event he should outlive the minors, they would never receive any part of the income or *corpus* from the trust after the limited payments for their support and maintenance ceased.

By the compromise all this was changed. The four minors became *immediately vested for their respective lives* with an aggregate of 25% of the trust income, which was to be increased to 62½% upon Alzoa's death. There was no longer *any possibility whatsoever* of these minors having to face an undetermined period of years in which they would receive no income. This very feature of security of income was urged upon the lower court in the petition for compromise as being a special benefit to the minors accruing therefrom. R. 555-556.

The District Court of Appeal in its opinion "assumed" that "by the compromise the living children received income not provided by the original trust." R. 606. In spite of this, and the conceded *loss* to the remaindermen of $120,000, that court held that the children *represented* the remaindermen so as to bind the interests of the latter to the contract of compromise by reason, as it says, of

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*Rather than being a "remote" contingency, as stated by the District Court of Appeal [R. 607], this was the probability of actuarial tables.

"the decisive fact * * * that the remaindermen had no interest in the *income;* the living children had no interest in the *corpus* * * *." R. 607.

We respectfully submit that there is no "decisive fact" establishing virtual representation arising out of this situation. If the children, as the District Court of Appeal admits, *gained* by the compromise an addition to the only portion of the trust in which they had an interest—the income—and the remaindermen *lost* a substantial sum from the *corpus in which the children concededly had no interest,* it cannot possibly be contended that the children's motive and inducement to favor or oppose the compromise was identical with that of the remaindermen.

Consequently, the fact that the portion of the *corpus* taken from the unborn under the compromise went directly to Garland and Alzoa only, is wholly immaterial. The important thing is that the children naturally viewed the compromise, quite aside from the benefit derived from the dismissal of the litigation, as otherwise advantageous to them. They were not faced with the burden of weighing on the one hand the loss of $120,000 from the *corpus* and on the other the dismissal of the lawsuit, as a member of the class of remaindermen would have been. They desired the benefits accruing to them from the compromise and had no particular interest in seeing that the unborn remaindermen's *corpus* remained intact or was cut down as little as possible. As a result, the entire basis for postulating virtual representation on their consent must inevitably fail.

6. The Implication of the District Court of Appeal That a Trustee May Represent Some Beneficiaries as Against Others so as to Bind Them to a Compromise to Which the Trustee Refuses to consent Only Serves to Emphasize the Lack of Due Process Herein.

Respondents have argued throughout this litigation that, absent any other ground of jurisdiction over the remainder interests, such jurisdiction was gained by the presence in the litigation of this trustee. While declaring that "it is not necessary to go into this question to any particular extent," the opinion of the District Court of Appeal [R. 609] states that "there is strong authority for the statement that if it were necessary in order that justice might be done to living parties, the interests of contingent remaindermen in this trust estate could be represented by the trustee." The implication of this statement is that the trustee represents the remaindermen in the "compromise."

Obviously, the compromise, being a contract, requires the voluntary consent of all parties thereto. This trustee has at all times refused to consent. If respondents here desire to depend on the trustee for jurisdiction by representation, they must accept the trustee's refusal to consent, and the compromise fails for want of consenting parties insofar as it purports to affect the property of the remaindermen. The judgment below cannot be supported on any ground of virtual representation of the unborn remaindermen in the "compromise" on any claim

that the trustee is the representative of those absent parties in view of the trustee's refusal to enter into the contract of compromise.

Aside from all this, however, it is settled law in California—and the opinion of the District Court of Appeal does not purport to refute it—that in a controversy between a settlor and beneficiaries, such as this case was, *the trustee is in no sense the representative of either faction.*

> *Hutchins v. Security Trust & Savings Bank* (1929), 208 Cal. 463.

Accord:

> *Lake v. Dowd* (1929), 207 Cal. 290;
> *Mitau v. Roddan* (1906), 149 Cal. 1;
> *O'Connor v. Irvine* (1887), 74 Cal. 435.

On the other hand, it is equally well settled in California that a trustee may and should point out to the Court, in appropriate cases, that the interests of absent beneficiaries are being vitally and substantially affected. *Gray v. Union Trust Co.* (1915), 171 Cal. 637, 639. This course, which petitioner has followed throughout the case, is the exact antithesis of virtual representation. The failure of the District Court of Appeal to recognize this distinction only serves to emphasize the lack of due process complained of.

7. The Statement by the District Court of Appeal That the Court Had Inherent Power to Appoint a Guardian Ad Litem Does Not Support Any Claim of Representation From That Source.

In his effort to find some basis on which to bind the unborn and unascertained remaindermen to the compromise, under which he received such substantial returns at their expense, plaintiff devised a wholly novel procedure. R. 574. By his *ex parte* petition, plaintiff procured an order purporting to appoint a guardian *ad litem* to represent the unborn and unascertained remaindermen. This appointment was not sought until after plaintiff had amended his complaint to ask for a "revision, reformation and modification" of the trust so as to give him the exact benefits which he subsequently received by the compromise; and it was obviously and expressly for the purpose of representation in such compromise. R. 578-580.

The "guardian *ad litem*" joined in the petition for compromise and appeared at the hearing thereon. R. 540; 535-537. Both there and in the briefs before the District Court of Appeal, plaintiff urged that jurisdiction over the interests of the unborn was acquired by this most novel example of pulling oneself up by one's bootstraps.

In its treatment of this unprecedented proceeding, the opinion of the District Court of Appeal is again dangerously obscure. It merely says R. 608:

> "To aid it in the exercise of its jurisdiction to hear and determine this matter, the court appointed a guardian *ad litem* to represent and protect the interests of the contingent remaindermen. Courts of justice as an incident of their jurisdiction have inherent power to appoint guardians *ad litem*."

In so stating we submit that the District Court of Appeal has simply multiplied confusion. The inherent power of a court of equity to appoint a guardian *ad litem* for *living persons* referred to in the two California cases cited by the court in support of its statement* can only be exercised *after* the court has obtained jurisdiction of such persons by the service of process upon them. If such jurisdiction has not been obtained, the appointment is void. (*Akley v. Bassett* (1922), 189 Cal. 625; *Johnston v. San Francisco Savings Union* (1883), 63 Cal. 554.)

In this case plaintiff is asserting that the appointment itself and the appearance of the guardian *created* the jurisdiction over the persons of the unborn. We believe that in no case, in the absence of statute authorizing such procedure (and, as we have seen, California has none save in Torrens Title Proceedings) has any court appointed a guardian *ad litem* unless it first had procured jurisdiction of the persons or their interests by ordinary means.

The present attempt to innovate a procedure without prior statutory authority by simply having one of the interested persons petition and nominate a lawyer to represent the unborn interests and thus gain power to destroy them, is wholly subversive of established principles of due process of law. Certainly the obscure statement in the opinion of the District Court of Appeal last above quoted does not support the fundamental requirement of jurisdiction essential to the rendition of a valid judgment

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Crawford v. Neal, 56 Cal. 321 (1880); *in re Cahill*, 74 Cal. 52 (1887), each relating to the appointment of guardians *ad litem* for minor plaintiffs.

when drawn into question as denying due process. This evasive statement may not be used to cover the inherent unfairness in this proceeding and the fundamental denial of due process of law in attempting to force this compromise upon and at the expense of the absent parties.

8. Consistent With Due Process of Law, Living Persons May Represent Unborn and Absent Parties Only in Adversary Proceedings, Not in Contractual Dealings.

The principles of virtual representation, when properly applied, permit the court to *adjudicate on controverted issues presented to it.* Virtual representation does not warrant or justify living parties in *contracting* away, instead of *defending,* the interests of the unborn and absent parties.

The District Court of Appeal opinion in stating the applicable rule of virtual representation repeatedly describes that rule in connection with defending litigation. For example, saying [R. 604] "when rights of living persons in ordinary common sense *ought to be adjudicated,*" and [R. 608] saying that the court "had the right and it was its duty to *adjudicate* this case," and [R. 608] "to *adjust all the differences* arising from the cause of action presented." However, this was not what was done in this case. The court did not *adjudicate* any of the issues presented in the litigation nor did it *adjust* any of the differences between the parties to that litigation. The living beneficiaries themselves, for reasons suf-

ficient unto themselves, entered into an agreement modifying the trust, under which each living party received a present or potential improvement in his or her position under the trust. The consideration making this agreement possible came directly from the *corpus* and went not only to the plaintiff but to the other living defendants. The only reason for the presentation of the compromise to the court was in an attempt to bind these unborn through so-called "representation" by the very parties who had made this agreement.

As far as those parties who were *sui juris* were concerned, the court had neither power nor right to require them to make or to prevent them from making any compromise. As far as the living minors were concerned, the requisite statutory approval could have been equally as well rendered by the court supervising their guardianship estates as by the court sitting in equity. Hence, there was in this case no room for the application of the principles of virtual representation in order that contested issues between the living be adjudicated. What was done was to permit the application of the principles, not in any litigation, but in consensual bargaining, and this, despite the fact that it is settled law in California that persons not before the court cannot be bound by consent decrees under the doctrine of virtual representation. *County of Los Angeles v. Winans* (1916), 13 Cal. App. 234, at 255.

We respectfully submit that the bargaining away by contract of the rights of absent parties by living persons who receive benefits therefrom, is so inherently unfair as to be wholly repugnant to the requirements of due process of law.

9. The Rights of Petitioner Are Directly Affected by the Lack of Due Process Complained of Herein.

Absent the compromise decree affirmed by the District Court of Appeal, it would be the duty of petitioner, as trustee, to have on hand for payment over to the remaindermen at the termination of the trust, the $120,000 in corpus directed by the decree to be turned over to the income beneficiaries.

Under the trust indenture, that $120,000 belongs absolutely and unconditionally to the absent remaindermen (subject only to deferment of their possession thereof). The decree directs the immediate withdrawal and payment thereof to income beneficiaries who, under the trust indenture, have no possible right or interest therein. Since the trust indenture is the charter of the trustee's powers and duties, such withdrawal and payment will subject it to liability—*personal* liability—to the remaindermen.

If the decree resulted from due process of law, the remaindermen would be bound thereby and the trustee protected in making such withdrawal and payment. But if (as the trustee has contended throughout) the procedure below was lacking in due process as to the remaindermen, the trustee will be compelled, at termination of the trust, to restore that $120,000 to corpus *out of its own funds*. Thus the trustee, petitioner herein, has a direct financial interest to the extent of at least $120,000 in the determination of this question. For this reason the trustee's own property is being taken without due process of law.

Accordingly, this case is not to be distinguished in principle from that of *Buchanan v. Warley* (1917), 245 U. S. 60, 62 L. Ed. 149 (where a *white* vendor was per-

mitted to raise the constitutional deficiencies of an ordinance prohibiting occupation by a *colored* vendee.) The court there stated, at page 73 (160):

> "This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved."

To the same effect is the case of *Truax v. Raich* (1915), 239 U. S. 33, 60 L. Ed. 131, where an *employer* was permitted to test the constitutionality of a statute limiting the employment of aliens.

It is therefore respectfully submitted that the lack of due process herein complained of directly and inevitably affects the property right of petitioner to carry on its business as a trustee without having an unassumed liability foisted upon it in the manner shown by the record herein.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the District Court of Appeal of the State of California should be granted.

LOUIS W. MYERS,
PIERCE WORKS,
Counsel for Petitioner.

O'MELVENY & MYERS,
WILLIAM B. CARMAN, JR.,
JACKSON W. CHANCE,
Of Counsel.

APPENDIX.

(CONSTITUTION OF CALIFORNIA, ART. VI.)

§4. JURISDICTION OF SUPREME COURTS AND COURTS OF APPEAL. The supreme court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the supreme court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and *habeas corpus*, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. . . .

§4a. APPELLATE DISTRICTS. The state is hereby divided into three appellate districts, in each of which there shall be a district court of appeal, consisting of such number of divisions having three justices each as the legislature shall determine; and until so determined otherwise, the courts of appeal for the first and second appellate districts shall each consist of two divisions, and the court of the third appellate district shall consist of one division.

§4b. JURISDICTION OF DISTRICT COURTS OF APPEAL. The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the supreme court) in all cases at law in which the superior courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal, or in justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as may be provided by law; also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the supreme court which shall be ordered by the supreme court to be transferred to a district court of appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and *habeas corpus*, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. . . .

§4c. TRANSFER OF CASES BETWEEN SUPREME AND APPELLATE COURTS. The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment

has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced.

The supreme court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal for another district, or from one division thereof to another, for hearing and decision.

Due service of the within petition and brief is hereby acknowledged this.....day of September, A. D. 1942.

_____

_____

Attorneys for Respondent.

9-3-42—65

IN THE

Supreme Court of the United States

October Term, 1942.

No. 379.

TITLE INSURANCE AND TRUST COMPANY, a corporation,
Petitioner,

vs.

HARRY C. MABRY, as Executor of the Last Will and Testament of William J. Garland, Deceased, *et al.*,
Respondents.

BRIEF FOR RESPONDENT MABRY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GURNEY E. NEWLIN,
ALLEN W. ASHBURN,
1020 Edison Building, Los Angeles,
Solicitors for Respondent Harry C. Mabry, as Executor of the Last Will and Testament of William J. Garland, deceased.

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Preliminary Statement.

Having created the trust for the benefit of himself, his wife, four infant children and possible grandchildren [R. 599-601]. William J. Garland "filed a complaint in the Superior Court, alleging fraud, undue influence, and failure of consideration, and praying that the trust be cancelled and set aside, and that title to the real property and personal property involved be quieted in him" [R. 600]. "If an affirmative finding could have been made as to any such facts, supported by competent testimony, the court had power to terminate the trust" [R. 607]. Peti-

tioner does not challenge this statement. And such a decree in favor of plaintiff would mean complete destruction of all possible interests of unborn contingent remaindermen.

In petitioner's printed argument below, at page 5, respondent's brief was quoted:

> "The court acquired jurisdiction to try the issues under the original complaint through virtual representation of the unborn remaindermen by the living defendants."

And counsel then said:

> "We concede this, because the original complaint aimed at the total destruction of the trust. The interests of the living defendants in resisting that attack were substantially identical with those of the unborn, and those interests were so large as to create a presumption that the living defendants would resist that attack as vigorously and as faithfully as the unborn would have done if they had been present."

Likewise the petition for hearing in the Supreme Court said at page 22:

> "The principles of virtual representation are properly applied to permit the court to *adjudicate on controverted issues presented to it.* This proposition was recognized by this appellant before the District Court of Appeal in conceding that in the defense of the settlor's initial attack on the trust the living, having substantially the same interests in repelling that attack as the unborn, could virtually represent the latter." (Emphasis by author.)

Obviously, with the interests of the unborn properly represented by the life tenants, there could be no claim

of want of due process so long as the plaintiff's complaint was being contested.

Petitioner's concession of initial jurisdiction over the interests of the unborn, through virtual representation, covers the entire period of the litigation down to the filing the Petition to Compromise. At this point it is claimed that a divestiture of jurisdiction over the interests of the unborn occurred and that henceforth the court had no power to make any order affecting those interests because the compromise was unfair to them. (See pp. 10-15 *infra.*)

The situation then confronting the parties and the court in determining whether the litigation should be pursued or compromised is thus described in the findings at R. 519:

> "That there is a present substantial and actual risk to all the beneficiaries of said trust, other than plaintiff, including the unborn and unknown remaindermen thereof, if the above entitled and numbered action be not compromised as set forth in said petition to compromise or if the matter should proceed to trial upon the complaint and amendments to the complaint and the various answers on file thereto, in that plaintiff may prevail at the trial of said action and that the beneficiaries of said trust other than plaintiff, including the unknown and unborn remaindermen thereof, may or might lose all the benefits now conferred upon them by said declaration of trust, but under said compromise there is irrevocably saved and preserved to and for them the major portion of such benefits; that it is to the advantage of said beneficiaries of said trust, including the unborn and unknown remaindermen thereof, to settle and compromise their differences with plaintiff, and

> to settle and dispose of said action on the basis of and in accordance with the agreement of compromise referred to in said petition to complaint * * *."

And the District Court of Appeal held it to be:

> "evident that the compromise was fair and equitable and that unless the case was thus disposed of, the plaintiff had presented a *bona fide* contention, which, if found true, would have required the annulment of the entire trust." [R. 609.]

The requisites of due process of law applicable to such a situation are prescribed by *Hansberry v. Lee*, 311 U. S. 32, at 42, as follows:

> "Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits (citing cases); nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests (citing case), this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. (Citing case.)"

Contemporaneously with the filing of Petition to Compromise every possible step was taken to assure full and fair representation of the unborn and unknown contingent remaindermen. Throughout the compromise phase of the case they were trebly represented—(1) by the life tenants acting through their guardian *ad litem*; (2) by Mr. Mathes, appointed specially as guardian *ad litem* to repre-

sent the interests of said remaindermen; and (3) in fact by the trustee, which has consistently and insistently maintained that the compromise is unfair to the unborn and hence should not be made. As soon as a *possibility* of conflict of interests arose, Mrs. Scott, the mother, retired as representative of the infant life tenants [R. 175], Mr. Hartke was appointed their guardian *ad litem* [R. 408], and Mr. Mathes was designated by formal court order [R. 578] to act as guardian *ad litem* for the preservation of the interests of unborn and unknown contingent remaindermen.

And the compromise which was effectuated as a result of this three-fold protection of the absentees was in no manner or degree unduly burdensome to them or otherwise unfair. The trial court found at R. 520-21:

> "that the said compromise is not unfair, unjust or inequitable in any degree to the unborn or unknown recipients of the corpus of said trust upon the termination thereof, but, on the contrary, said compromise is fair, just and equitable to, and to the best interests of, all persons now interested and all persons who at any time in the future may or might be or become interested in said trust and its assets and properties, including the unborn and unknown remaindermen; that all parties defendant, except defendant Title Insurance and Trust Company, are sharing in and contributing substantially to the said compromise, and it is untrue that the entire financial burden of the said compromise, or any disproportionate part thereof is thrown upon the unborn and unknown remaindermen; * * * that the dictates of equity and good conscience and the interests of all possible beneficiaries of said trust require that such compromise should be granted * * *."

The District Court of Appeal said in this connection at R. 609:

> "Appellant suggests that the compromise was unfair and inequitable. It should be apparent from what has already been said that it is our conclusion that the trial court, having before it all of the facts in the case, properly held the compromise to be fair and equitable."

And at R. 607:

> "And computations are in the briefs which indicate that should any of these contingencies come to pass, neither income nor corpus will be depleted to the disadvantage of the remaindermen. Therefore, there was no adverse interest as between the living children and their issue which prevented the living children from representing the unborn contingent remaindermen."

Those computations are reproduced in the Appendix hereto, and discussed at pages 44-48, *infra*. They prove that the eventuation of any of eight normal hypotheses would result in less contribution by the unborn remaindermen than by the four life tenants (their potential parents) in every instance except the seventh.

The appointment of a guardian *ad litem* for protection of the interests of the unborn remaindermen was the exercise of an inherent power of a California equity court; so held at R. 608. If statutory authority were needed, it would be found in Section 187, California Code of Civil Procedure, which is as follows:

> "Means to carry jurisdiction into effect. When jurisdiction is, by the constitution or this code, or by any other statute conferred on a court or judicial

officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

The presence of a guardian *ad litem* charged solely with protection of the interests of the unborn and unknown contingent remaindermen and of the trustee (petitioner), who was vigorously opposing the compromise upon the ground that it was unfair to the unborn (while protesting that no one was representing them), was enough to assure a fair result. And this dual representation was superimposed upon the virtual representation of the four infant life tenants who never acted in person and throughout the compromise hearing were represented by a guardian *ad litem*; under California law he had the status of mere adviser to the court and could have no possible incentive to work any inequity with respect to the potential issue of his wards. Indeed, the compromise was actually made by the court and not by either guardian *ad litem*.

"The court is, in effect, the guardian—the person named as guardian *ad litem* being but the agent to whom the court, in appointing him (thus exercising the power of the sovereign state as *parens patriae*) has delegated the execution of the trust; and through such agent the court performs its duty of protecting the rights of the infant or incompetent person." (*Cole v. Superior Court*, 63 Cal. 86, 89.)

"And what are the principles governing the conduct of a guardian *ad litem*? It is the right and duty of the court to protect the interests of the incom-

petent represented by the guardian *ad litem* and to exercise supervision over the conduct of that guardian. * * * The court and not the guardian *ad litem* has the power to compromise the rights of minors under suitable circumstances." (*Whitten v. Dabney*, 171 Cal. 621, 631-32.)

See, also:

Morris v. Standard Oil Company, 192 Cal. 343, 351.

The trial court found the making of the particular settlement to be the prudent and equitable thing to do [R. 519], and the District Court of Appeal said at R. 608:

"A court of equity in its general jurisdiction over trusts has power to do whatever is necessary to preserve a trust from destruction, including the power to modify and change the terms of the trust. (Citing cases.)

"In this case it was proper for the Chancellor to approve the compromise agreement, having in view the preservation of the trust itself."

Unsupported Assertions and Assumptions of Petitioner.

The "careful ambiguities and silences" of the instant petition call for a clarification of the state of the record in this case, and indeed of petitioner's ultimate contention. The holding in the cited cases of *Hansberry v. Lee*, 311 U. S. 32, and *Riley v. New York Trust Co.*, 315 U. S. 343, is expressed in this sentence of the Chief Justice, concurring in the *Riley case*: "To have bound him (the absent party) by representation of those so adverse in interest would have been a denial of due process" [p.

356]. And petitioner's zeal to come within these holdings leads it into assumptions and assertions that the record does not warrant.

(1) Each of petitioner's major arguments rests upon an asserted conflict of interest between the infant life tenants, as virtual representatives, and the unborn contingent remaindermen, as represented, with a resulting benefit to the former at the sole cost of the latter. This is directly in the teeth of the express finding of the two state courts, quoted above.[1]

(2) Nowhere in the petition are the potential children of the minor life tenants recognized as *contingent* remaindermen. The whole argument proceeds upon the assertion that the equitable remainder is "owned" by the potential issue of these infant life tenants,—that it "belongs absolutely and unconditionally to the absent remaindermen (subject only to deferment of their possession thereof)" [p. 28]. Similar expressions are found at Petition pages 3, 4, 9, 16 and 22. California Civil Code, Section 694 is as follows:

> "Vested interests. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest."

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[1]As to the effect of such findings of fact made by two state courts, see *Marshall Dental Mfg. Co. v. Iowa*, 226 U. S. 460, 461; *Portland Ry. etc. Co. v. Railroad Com. of Oregon*, 229 U. S. 397, 412; *Great Northern Ry. Co. v. Knapp*, 240 U. S. 464, 466; *Ward and Gow v. Krinsky*, 259 U. S. 503, 511; *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 394; *Grayson v. Harris*, 267 U. S. 352, 357.

And Section 695:

> "Contingent interests. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain."

And the District Court of Appeal said:

> "They are all contingent remaindermen. When it is necessary to distinguish between the two classes, issue of the living children will be referred to as unborn contingent remaindermen." [R. 599.]

Petitioner asserts that "No person now living or ascertained has any interest in the corpus of this trust" [p. 6]; but the Petition to Compromise avers that "in the event that said trust * * * were to finally terminate pursuant to its terms on this date, said Grace O. Garland and said Jane Mary Garland are all of the heirs and are the sole heirs at law of plaintiff" [R. 543], which averment was impliedly found to be true [R. 518]. Indeed, the instant petition refers to them as presumptive heirs and says, at page 18, that "Garland's then wife and daughter * * * would have been his heirs at law had he then been deceased", thus showing that the remainder is presently vested in them subject only to defeasance through birth of issue of some of the four infant life tenants and their survival of all six life tenants. These "presumptive heirs" [R. 602] appeared in the compromise proceeding [R. 517-18] and the only absentees were the unborn and unknown contingent remaindermen. Petitioner counts only upon the supposed rights and alleged injuries of the unborn. Personal jurisdiction over the unborn persons being inherently impossible, it was equally impossible that any estate could vest in them prior to their

existence (see Point III, *infra*). And so the reiterated contention that they are "sole owners" of the remainder falls of its own weight.

(3) Further laboring to don the mantle of the *Hansberry* ruling, petitioner argues against the finding of the Appellate Court that:

> "These contingencies are too remote to require a decision that the incentive on the part of the living children to protect and preserve the rights of their issue was destroyed. * * * Therefore, there was no adverse interest as between the living children and their issue which prevented the living children from representing the unborn contingent remaindermen." [R. 607.]

And counsel urge the hypothetical motivation of the life tenants [aged 11 to 16 years—R. 543], saying:

> "The important thing is that the children naturally viewed the compromise, quite aside from the benefit derived from the dismissal of the litigation, as otherwise advantageous to them. * * * They desired the benefits accruing to them from the compromise and had no particular interest in seeing that the unborn remaindermen's *corpus* remained intact or was cut down as little as possible." [Petn. p. 21.]

But the fact is that these infants acted not in person, but through their guardian *ad litem*, Mr. C. H. Hartke [R. 535], who had no power to do more than recommend to the court; the compromise being made by the court and not the guardian. (See quotations from *Cole v. Superior Court* and *Whitten v. Dabney, supra.*) And so the putative cogitations of these children concerning the benefits to be gained over their potential issue count for naught.

(4) Again, the constant assertions throughout the petition that the entire burden of the compromise must be borne by the unborn contingent remaindermen, that they have "lost" $120,000 of corpus [p. 21] with no corresponding gain, that the grandparents of these possible remaindermen "each raided the interest of the unborn" [p. 19], wholly disregard the contrary finding [R. 519-20] that the compromise was the prudent thing in order to save the entire remainder from the threat of destruction through successful prosecution of the pending action, which finding was approved by the District Court [R. 609].

(5) Concerning the representation of the unborn contingent remaindermen by Mr. Mathes as guardian *ad litem*, counsel assert [pp. 4, 25] that plaintiff selected and nominated Mr. Mathes. This finds no support in the record, which shows that the appointment was made on plaintiff's motion [R. 579] but does not sustain the assertion that he had any hand in selecting the guardian. Indeed, the formal order recites a previous appointment of Mr. Mathes [R. 578]. And counsel for petitioner paid him high tribute in their reply brief in the District Court of Appeal, saying at page 35:

> "Mr. Mathes is an esteemed, an able and a justly honored and respected member of the bar. We know that he has performed what he conceived to be his duty in this proceeding with diligence and conscientiousness. His able brief in support of his position in the proceeding and of the compromise is an eloquent witness to that fact."

This leaves no room for the inference which petitioner would have the court draw from the assertion that the guardian was selected and nominated by plaintiff.

Petitioner's Real Contention Reduces Itself to a Question of Fact.

Actually obscured by these factitious aids is the position that petitioner took in the state courts and which is immanent in the instant petition and brief, namely, that there was a divestiture of existing jurisdiction over the interests of the unborn contingent remaindermen, not an original absence of such jurisdiction.

The significance of this, as will be shown, is that petitioner's present claim of denial of due process, when clearly defined, reduces itself to one of fact determinable upon common law principles and hence not a Federal question.

We have heretofore quoted the affirmative concessions made by petitioner in the state courts to the effect that it contended for a divestiture of jurisdiction as an incident to the compromise, not for an initial absence of jurisdiction or any want of due process in the proceeding antecedent to the Petition to Compromise. The opinion below clearly reflects this as appellant's viewpoint:

> "The principal argument in support of this proposition is that the interests of living children and their unborn issue became adverse *when by the compromise agreement*[2] the parents of the living children", etc. [R. 607.]

And it was really in response to this argument that the court said:

> "Therefore it had the right and it was its duty to adjudicate this case, unless the action of all of the parties except the trustee in presenting the petition

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[2]All italics ours, unless otherwise indicated.

to approve the compromise, divested the court of jurisdiction." [R. 608.]

"Having once acquired jurisdiction in equity, the court was not ousted thereof because of its approval of the compromise." [R. 609.]

The instant petition makes no claim whatever that such initial jurisdiction over all interests did not exist and indirectly discloses [pp. 3, 7, 8, 14, 21, 22, 26] that counsel are still contending for a divestiture as an incident to the petition for compromise. The "important question of law" here presented is defined at page 3 as "the application of the doctrine of virtual representation to a purported 'compromise' of litigation between living beneficiaries of a trust wherein the validity of the trust was attacked." At page 9 the distinction is carefully drawn when counsel say that there was error "In holding that the doctrine of virtual representation may be applied, consistently with due process of law, to a 'compromise' of pending litigation (rather than a *defense* of such litigation) where the compromise involves" etc. and at page 26, "Virtual representation does not warrant or justify living parties in *contracting* away, instead of *defending*, the interests of the unborn and absent parties." (Emphasis by author.)

Reiterating its denial that it represents the unborn contingent remaindermen (Petn. pp. 23, 28), petitioner now urges that it, Title Insurance and Trust Company, has been denied due process in that the court's jurisdiction over the unborn ceased immediately upon filing of Petition to Compromise because its unfairness robbed the life tenants of capacity for further virtual representation (pp. 14-28). Thus the constitutional question turns upon the

factual issue of unfairness of compromise, which has been found against petitioner. This is emphasized by the circumstance that initially, in responding to the Petition to Compromise, petitioner, after raising indirectly the claim of absence of indispensable parties, said this:

> "This does not mean that said action should not or may not be compromised upon a fair and equitable basis if the same can be arrived at." [R. 571.]

Predicated upon the assumption that all of these means of protecting the unborn were utterly futile, petitioner now says that it was denied due process of law because these abortive attempts to protect the unborn lacked the essentials of that guaranty. But petitioner's interest herein is only that of trustee. It does not assert that it did not have lawful notice and a full hearing, or that the judgment takes any of its property; nor does it show that it is directly affected or its property placed in imminent danger of loss or impairment. It merely asserts the fear that some day it may be held liable in its personal capacity for sums paid out of the trust pursuant to the terms of the instant decree.

Petitioner's Fears of Personal Liability Are Fanciful.

The attenuated nature of the claim is readily perceivable. The declaration of trust created equitable life estates for six living persons—Mr. Garland, his wife Alzoa (now Mrs. Alzoa Scott) and their four living children. Upon the death of the last survivor, the equitable remainder vests in the surviving issue (or spouses) of the four children or, failing such issue or spouses, in the "heirs at law" of Mr. Garland ascertained as of that time [R. 82]. After divorce from Alzoa, Mr. Garland

remarried. His wife, Grace Garland, and Jane Mary Garland, infant daughter of this later marriage, were and are the presumptive remaindermen in the trust and as such the owners of a vested, though defeasible, estate.

Petitioner's argument is thus built upon a series of hypotheses, namely, that the children of William and Alzoa, or some of them, will leave issue surviving all six life tenants, thus divesting the remainder estate of Grace and Jane Mary; that those grandchildren of William and Alzoa will refuse to recognize the binding effect of the instant judgment; that they will institute action against the trustee to compel restoration to the trust of the moneys paid out pursuant to the judgment; that they will be held to have had vested in them, though nonexistent, estates such as the constitution protects (see Point III, *infra*); and that they will succeed notwithstanding the fact that the judgment is binding upon the trustee and its payments made involuntarily and under the coercion of governmental authority. When and if all these things eventuate, says petitioner, it will have been deprived of its property without due process because these potential remaindermen will have been deprived of their property without due process. It is apparent that petitioner's rights are not so directly and certainly affected as to enable it to raise the constitutional question which it would now present, and by the same token it is in no position to urge the rights or potential rights of others.

Petitioner's Actual Representation of Unborn Contingent Remaindermen.

In this connection it should be remembered that petitioner must stand or fall upon the claim that it does not represent and has not represented the unborn contingent remaindermen at any stage of these proceedings. If it has in legal contemplation represented them, all pretense of lack of due process disappears, and petitioner so concedes. Petitioner as trustee did in fact wage a vigorous battle on their behalf in opposition to the compromise. It has repeatedly conceded its right and duty to represent them in the premises.

At R. 569 it said, in objecting to the petition for compromise:

> "1. The trustee has been advised, is of the opinion, and respectfully submits to the court that it is its duty, as such trustee, to oppose any compromise or modification or revision of the declaration of trust herein the effect of which would be to injure or to impair the rights of any beneficiaries who are neither *in esse*, nor *sui juris*, nor before the court."

At R. 300 in its answer to the complaint:

> "8. Denies that Title Insurance and Trust Company represents neither faction to this controversy or is made a party hereto by reason of the fact that it holds legal title to the properties covered by the declaration of trust attached as Exhibit C to the complaint. In this connection alleges that this defendant has in the past performed, and will continue to perform, its duty as trustee to uphold and maintain the integrity of the said trust evidenced by said declaration of trust, a copy of which is attached to the complaint as Exhibit C."

And in its memorandum of authorities in support of demurrer, at R. 375:

> "It is the duty of the trustee to see that the rights of the remaindermen are protected. Gray v. Union Trust Co., 171 Cal. 637; Estate of Duffill, 188 Cal. 536, 554."

Moreover, the trustee adopted and virtually reiterated Alzoa Scott's claims concerning the merits [R. 304, 310-320] and conceded [R. 571] that its opposition to the compromise "does not mean that said action should not or may not be compromised upon a fair and equitable basis if the same can be arrived at."

The trial court found

> "that the trustee of said trust was and is before the court in this action and proceeding, and was and is subject to the jurisdiction of this court; and further that the trust property and properties is and are before and within the jurisdiction of this court for all purposes of this proceeding." [R. 519.]

This finding was, of course, affirmed. The District Court of Appeal in its opinion said [R. 609]:

> "Indeed, the trustee has consistently and vigorously and ably presented to the trial court and to this court its opposition to the judgment approving the compromise and modifying the trust. * * *
>
> "Appellant suggests that the compromise was unfair and inequitable. It should be apparent from what has already been said that it is our conclusion that

the trial court, having before it all of the facts in the case, properly held the compromise to be fair and equitable."

The instant petition confirms this actual representation of the unborn contingent remaindermen by the trustee. It says at page 8:

> "Believing that the interests of the unrepresented unborn were being vitally and substantially affected by the diversion of $120,000 of corpus to the settlor and the living beneficiaries, petitioner as trustee, not only in order to oppose the imposition upon it of a personal liability through a void judgment but also *as a matter of duty to absent beneficiaries* (Gray v. Union Trust Co., 171 Cal. 637, 639), *appeared and opposed* [R. 566] *and has continued to oppose the proposed settlement* and to contest the Court's power to order the trustee to make payments out of corpus as provided thereby."

The reference to R. 566 carries the court to petitioner's Answer to Petition to Compromise which contains the above quoted concession that the action may be compromised upon a fair and equitable basis [R. 571].

The battle waged by the trustee was and is dual in form, but in form only. First, it is urged that upon filing of Petition to Compromise the interests of the unborn ceased to be before the court because no one could represent them for the purpose of compromise, and, secondly, that the compromise could not be made because it was unfair to them. But it is immediately conceded that a fair

compromise could be sanctioned by the court, which necessarily means that there was existing jurisdiction to that end. Jurisdiction and due process are thus made to depend upon the merits of the compromise itself, and the trustee's two contentions now merge into one. Obviously it is a question of fact governed by general and state law, which was decided against petitioner. And counsel do not undertake to establish a want of evidence to support the finding. They do not attack the computations included in the Appendix hereto; they merely seize upon certain factors deemed helpful and on that basis assert a condition opposed to the findings.

We shall show that all requisites of due process were present throughout all stages of the instant proceeding and with respect to all interests in the trust, present or prospective, and that this is true when weighed in the balance of the cited cases of *Hansberry v. Lee,* and *Riley v. N. Y. Trust Co.* But there are certain preliminary considerations of a jurisdictional nature which we first advance.

I.

The Instant Petition Is Not Sufficient to Confer Jurisdiction.

A. The Constitutional Question Now Presented Is Not Shown by the Record to Have Been Raised in the State Court.

This court confines itself to a consideration of the specific questions which were properly raised in the state court.[4] And a mere general claim of denial of due process or violation of the Fourteenth Amendment is not enough; the claim must be sufficiently defined in the state court to point unmistakably to the right which is asserted here.[5] In case of ambiguity the opinion of the state court may be consulted in aid of its solution and this tribunal will concern itself only with the question as thus defined.[6]

The record at bar shows that petitioner asserted the rights of the unborn contingent remaindermen in the state courts and claimed a denial of due process as to them, while it now makes the additional claim that it, petitioner, has been denied its constitutional rights, that it has been denied due process because the unborn contingent remaindermen have been denied their rights. We are, of

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[4]*New York ex rel. Cohn v. Graves,* 300 U. S. 308, 317; *McGoldrick v. Compagnie Gen. Transatlantique,* 309 U. S. 430, 434-5; *Whitney v. California,* 274 U. S. 357, 362-3; *Dewey v. Des Moines,* 173 U. S. 193, 197-8.

[5]*Michigan Sugar Co. v. Dix,* 185 U. S. 112, 113-14; *Harding v Illinois,* 196 U. S. 78, 85-86; *Capital City Dairy Co. v. Ohio,* 183 U. S. 238, 248; *Clarke v. McDade,* 165 U. S. 168, 172; *Thomas v. Iowa,* 209 U. S. 258, 263.

[6]*Saltonstall v. Saltonstall,* 276 U. S. 260, 267-8; *Northwestern B. T. Co. v. Nebraska State R. Co.,* 297 U. S. 471, 473.

course, confined to the record as made by petitioner below, to the exclusion of briefs and oral argument in the state tribunals.[7]

The Fourteenth Amendment was first invoked by petitioner in its demurrer to the complaint as amended. With respect to the first count it was urged that:

> "7. In the event that plaintiff is granted the relief sought, or any part thereof, *the property of all beneficiaries other than plaintiff, defendant Alzoa Scott, and the four living children, will be taken without due process of law* in violation of the Fourteenth Amendment to the Federal Constitution, and likewise in violation of the Constitution of California, in that it would amount to a *taking of the property of those beneficiaries who are not parties to this action without due process of law.*" [R. 362.]

An identical claim is made with respect to other causes of action [see R. 364, 365, 367, 369, 371]. The point is not mentioned in the accompanying memorandum of authorities and is given a *pro forma* complexion by the assertion therein that "It is the duty of the trustee to see that the rights of the remaindermen are protected" [R. 375], which position, supported as it is by *Gray v. Union Trust Co.*, 171 Cal. 637, *Estate of Hubbell*, 121 Cal. App. 38, and *Estate of Duffill*, 188 Cal. 536, 554, connotes right and duty of the trustee to appear for the remaindermen and hence complete jurisdiction over their interests.

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[7]*Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54; *Live Oak etc. Assn. v. R. R. Com.*, 269 U. S. 354, 358; *Zadig v. Baldwin*, 166 U. S. 485, 488.

Petitioner's answer to the complaint as amended incorporates a Tenth Affirmative Defense containing this:

> "All beneficiaries of said trust are indispensable parties to this suit whereby plaintiff prays for a cancellation and rescission of the said trust. Any proceeding herein, or otherwise, which would result in terminating or *affecting the rights of any of said beneficiaries* not joined as parties herein would violate the Constitution of the United States, and particularly the Fourteenth Amendment thereto, as well as violating the Constitution of the State of California, article I, section 13." [R. 404.]

The District Court of Appeal construed the plea as relating to the rights of the remaindermen. It said:

> "By appropriate pleadings, representations to the trial court, and notice of appeal, the trustee, Title Insurance and Trust Company, has raised the principal question involved in this appeal, i. e., by judgment of the court modifying the trust, *was property of unborn contingent remaindermen taken without due process of law?*" [R. 603.]

The state court record discloses no claim that petitioner has been deprived of its own property without due process or that there has been any such derivative violation of fundamental rights as is now claimed. It seems manifest that a litigant cannot rely upon the constitutional rights of others throughout the state court proceeding and then evolve, for purpose of review by this court, a new and attenuated theory of denial of his own constitutional rights. If they were involved, that matter should have been presented by the pleadings to the state court.

But petitioner has not shown that its own interests are directly involved or confronted with any immediate danger of impairment.

B. Petitioner's Interests Are Not Directly Involved in Such Manner and Degree as to Entitle it to Raise the Question of Due Process Which It Now Advances.

It is elemental that a petitioner for certiorari cannot rest upon a violation of the rights of others and that he must show that he himself has sustained or is immediately in danger of sustaining some direct injury as a result of the ruling of which he would complain.[8]

Petitioner-trustee expressly disclaims any representation of the interests of the contingent remaindermen and now asserts a derivative denial of its own rights because their rights have been denied. Viewed in any other light the petition herein amounts to a concession that the trustee has represented them throughout, a negation of petitioner's basic contentions; it would spell due process afforded these remaindermen through the trustee's representation of them.

Only in the event of birth of grandchildren of William J. Garland and Alzoa Garland (Scott) and their surviving all six life tenants, with a resultant defeasance of the equitable remainder now vested in Grace Garland and Jane Mary Garland, could there be any possible threat to petitioner. And only in the further event of the surviving grandchildren asserting and establishing that they were while *in caelo* owners of vested interests protected

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[8]*Liberty Warehouse Co. v. Burley etc. Assn.*, 276 U. S. 71, 88; *Hendrick v. Maryland*, 235 U. S. 610, 621; *Massachusetts v. Mellon*, 262 U. S. 447, 1085; *Oliver Iron M. Co. v. Lord*, 262 U. S. 172, 180; *Public Utilities Com. v. Landon*, 249 U. S. 236, 246; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347-8 (Mr. Justice Brandeis' dissent); *City of Allegan v. Consumers' Power Co.*, 71 Fed. (2d) 477, 482 [Cert. denied 293 U. S. 586]; *Lehon v. Atlanta*, 242 U. S. 53, 56.

by the Fourteenth Amendment (see Point III, *infra*) and hence that the judgment does not bind their interests would there be any substantial threat to petitioner's property or rights.

> "To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval." (*Lehon v. Atlanta*, 242 U. S. 53, 56.)

In *City of Allegan v. Consumers' Power Co.*, 71 Fed. (2d) 477, 482 (cert. den. 293 U. S. 586), the court said concerning a similar attempt to pyramid speculations as to future events:

> "These assumptions are based upon speculations, and the threatened injury to the utility is so remote that it is difficult to recognize that it is immediately in danger of sustaining some direct injury."

Any possible threat to petitioner's rights would be a pale and puny thing, for the trustee could not be held liable to beneficiaries for payments made under the sanction and coercion of an order of a court having jurisdiction over the trustee [expressly found at R. 519].

The instant decision establishes as a matter of state law that the personal presence of the unborn is not necessary to jurisdiction over their interests; that they are vicariously before the court through virtual representation, through the presence of Mr. Mathes as guardian *ad litem* for such interests, and perhaps through the trustee's own presence; also that the judgment is binding upon the trustee and that it must obey the same. The decree says: "that the defendant, Title Insurance and

Trust Company, as trustee of said trust, should be instructed and directed to act and perform its duties in conformity with said declaration of trust as so modified, reformed and revised" [R. 521], and specific order to this effect follows [R. 522]. The least that can be said is that the state court ruling conclusively establishes that the contingent remaindermen are not indispensable parties to the litigation and that therefore the judgment binds the trustee regardless of its effect upon the remaindermen.

Even if the state court were in error as to the binding effect of its decree upon the interests of the remaindermen, it would nevertheless be true that the judgment binds the trustee and that petitioner in its trust capacity makes the specified payments under compulsion.

A court of equity in its capacity of universal trustee has inherent power to direct the conduct of persons occupying that conventional relation and subject to its jurisdiction; and the corollary is that such orders afford full protection to the trustee who obeys the same.[9] Indeed, "Failure of the trustee to obey a court order concerning the administration of the trust is nearly always considered a ground of removal" (3 Bogert on Trusts and Trustees, Sec. 527, p. 1666). Should it be ultimately held that the unborn contingent remaindermen are not bound by the instant judgment, the trustee's payment would fall in the same category as any loss of assets occurring without its fault, as for instance through fire, flood, act of God

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[9]See *Restatement of the Law of Trusts,* Sec. 201, comment a, p. 531; 2 *Scott on Trusts,* Sec. 201, p. 1085; 4 *Pomeroy's Equity Jurisprudence* (5th Ed.), Sec. 1064, pp. 179-180.

or other form of *vis major*. The trustee is liable for payments made or losses suffered when some degree of fault attaches to it and not in those instances where the loss occurs through controlling and unavoidable circumstances.[10]

C. The State Court Decision Is Based Upon Independent and Adequate Grounds of General or State Law Which Preclude Any Examination of the Federal Question Which Petitioner Would Raise.

As already shown, petitioner's real insistence was and is that the compromise is unfair to the unborn contingent remaindermen because it places the entire burden upon them and confers the whole benefit upon the life tenants, thus disqualifying the latter for virtual representation and leaving no other jurisdictional avenue open. But petitioner's concession that there was original jurisdiction over the interests of the unborn through virtual representation by the life tenants, coupled with the contention that such jurisdiction was divested because of alleged unfairness of the compromise with respect to the contingent remaindermen, leads inevitably to the conclusion that this case deals primarily, if not exclusively, with a matter of state or general law rather than one of Federal cognizance. For, upon petitioner's own argument there would be no divesting of jurisdiction if no conflict arose between life tenants and remaindermen,—in other words, if the burden of the compromise were borne equally by

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[10]See 2 *Scott on Trusts*, Sec. 204, p. 1096; *Restatement of Trusts*, Sec. 204; *Restatement of Law of Restitution*, Sec. 73; 2 *Perry on Trusts and Trustees* (7th Ed.), Sec. 924, p. 1572; *Estate of Cousins*, 111 Cal. at 451.

both classes of interests. When the state courts found that such was the case, that ended the litigation according to petitioner's own argument. The trial court so found at R. 520-21 and the Court of Appeal at R. 606, 609.

This question having been decided against petitioner (rightly or wrongly), other questions, such as the state court's jurisdiction to appoint a guardian *ad litem* for the unborn or the actuality and legality of the representation of their interests by the trustee, become immaterial in this court.

As petitioner's Federal question hinges upon a favorable determination of the general question of hostility in fact between virtual representatives and the represented, this case comes squarely within the purview of *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157, 163-66, and *Fox Film Corp. v. Muller*, 296 U. S. 207, 210.

We have shown, we think, that no Federal question was necessarily presented by the record made by petitioner at bar. It is true that the District Court of Appeal stated in an introductory way the existence of a question of due process [R. 603], but had it gone further and decided the point as one of Federal constitutional significance rather than general law, that would have had no effect in this court unless the constitutional question was necessarily involved. State courts cannot thus confer jurisdiction upon this court.[11]

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[11] *Lynch v. New York ex rel Pierson*, 293 U. S. 52, 54.

Unless the record affirmatively shows the Federal question to be necessarily involved and the case not adequately determined upon non-Federal grounds, jurisdiction in this court does not exist, for "jurisdiction cannot be founded upon surmise" (quoting the *Lynch* opinion). The opinion below scarcely raises a surmise of the determination of a Federal question, for the District Court of Appeal, after stating the existence of the question,—"was property of unborn contingent remaindermen taken without due process of law"—(without any specific mention of the Federal Constitution),[12] proceeded to discuss and decide the matter as one of general and state law, making no reference whatever to petitioner's reliance upon *Hansberry v. Lee, supra*. Clearly the decision rests upon independent and adequate non-Federal grounds and there is no jurisdiction to review it in this court.

But, in any event, the petition should be denied because the so-called Federal question raised herein does not possess sufficient substantiality to warrant interposition of this court.

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[12]Art. I, Sec. 13 of the California Constitution provides that no person shall "be deprived of life, liberty or property without due process of law." See *Bowe v. Scott*, 233 U. S. 658, 664-5.

II.

The Instant Petition Presents No Federal Question of Substantiality.

> "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." (*California Water Service Co. v. Redding,* 304 U. S. 252, 255.)

The opinion of the District Court of Appeal establishes conclusively[13] what the jurisdiction of the California court is with respect to the interests of unborn contingent remaindermen in trusts under its control and how such jurisdiction is to be exercised. It establishes that the California courts have inherent power to appoint a guardian *ad litem* to protect such interests against an attempt to destroy the trust or in order to preserve it through compromise [R. 608].[14] This decision also establishes that the doctrine of virtual representation applies as between life-tenant-parent and his or her unborn child who may possibly become a contingent remainderman when there is no actual hostility or diversity of interest between the potential parent and the possible child [R. 605-7]. In other words, California law recognizes two different

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[13] *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157, 166; *Federal Union Trust Co. v. Field*, 311 U. S. 169, 177-8; *United Gas etc. Co. v. Texas*, 303 U. S. 137, 139-41.

[14] If any implementation of this inherent jurisdiction were needed, it would be found in Sec. 187, C. C. P. which is quoted at page 6 hereof, for equity jurisdiction in California flows from Constitutional grant. *City of Pasadena v. Superior Court*, 157 Cal. 781, 793.

methods of protecting the potential interests of the unborn without sacrificing those of the living.

The opinion indicates that the court, had it considered a decision necessary, would probably have upheld respondent's contention that the trustee (petitioner) had a right and duty to represent those contingent remaindermen [R. 609] as it properly should under the authorities cited in petitioner's demurrer to the plaintiff's complaint as amended [R. 375].[15]

Denial of due process could be found at bar only if this court should hold with respect to all three methods of protecting the interests of the unborn that "It cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it" (quoting *Hansberry v. Lee,* 311 U. S. at p. 42). If any one of the three methods of representation passes this test, there is no Federal question left.

We include trustee representation in this assertion because the existence of a Federal question is itself a Federal question to be determined independently by this court[16] and the failure of the state court to decide the legal sufficiency of trustee representation will become immaterial if this court finds that such representation accords with the requisites of due process.[17] By this we mean to say that if guardianship and virtual representation should fail to meet the test of due process, there nevertheless could

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[15]*Gray v. Union Trust Co.,* 171 Cal. 637; *Estate of Duffill,* 188 Cal. 536, 554.

[16]*Honeyman v. Hanan,* 300 U. S. 14, 18.

[17]*Cf. Lawrence v. State Tax Commission,* 286 U. S. 276, 282; *Chapman v. Goodnow's Administrator,* 123 U. S. 540, 548.

be no holding of a denial of that constitutional right if this court should find, as here, that in fact there has been complete representation by the trustee and that it supplies in legal contemplation the measure of protection prescribed by the *Hansberry* decision. That such would be the proper holding follows from *McArthur v. Scott*, 113 U. S. 340, and the later case of *Miller v. Texas & Pacific Co.*, 132 U. S. 662, 671, which explains that it was the absence of a trustee that caused reversal of the *McArthur* judgment.

Representation of the Interests of the Unborn Contingent Remaindermen by a Guardian Ad Litem Especially Appointed for the Purpose Supplies All the Requisites of Due Process.

Petitioner's claim that virtual representation is the exclusive expedient for protecting the interests of the unborn finds no support in the authorities cited at page 17. But if it were true that protection of the interests of the unborn through a guardian *ad litem* had not been heretofore sanctioned, that fact would not raise a constitutional barrier to the devising of new methods of representation by the State of California.

These questions fall within the ambit of state policy,[18] especially as they pertain to the jurisdiction and procedure of the state courts. The State of California "is free to regulate the procedure of its courts in accordance with

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[18]*Missouri v. Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co. v. Snell*, 193 U. S. 30, 36; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517; *Truax v. Corrigan*, 257 U. S. at 373-4, dissenting opinion of Mr. Justice Brandeis; *Ex parte Converse*, 137 U. S. 624, 631-3; *Twining v. New Jersey*, 211 U. S. 78, 106.

its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing cases.) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." (Mr. Justice Cardozo in *Snyder v. Massachusetts,* 291 U. S. at 105.)

Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 296:

> "But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties."

Mr. Justice Black, dissenting in the same case, said:

> "In addition, I deem it essential to our federal system that the states should be left wholly free to govern within the ambit of their powers. Their deliberate governmental actions should not lightly be declared beyond their powers. For us to shear them of power not denied to them by the federal constitution would amount to judicial usurpation." (p. 302)

Hansberry v. Lee, 311 U. S. at 42:

> "Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; * * * nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts."

The District Court of Appeal well said concerning the rule of indispensable parties:

> "The reason behind the exception is a simple one of human relationships, implicit in the principle that human laws, and all other temporal things, are for the living; not for the dead or for those not yet in being, if to hold otherwise would result in injustice to living persons. Because parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated." [R. 604.]

And its finding [R. 608] that the inherent equity power of the Superior Court was properly exercised through the appointment of Mr. Mathes as guardian *ad litem* does not establish a rule peculiar to California.

The Restatement of the Law of Property (Future Interests) contains this caveat under Sec. 182 at page 734:

> "The Institute takes no position as to whether the general power of equity includes power apart from statute, to appoint a guardian *ad litem* for the interests limited in favor of unborn persons and thereby to permit a judicial proceeding to become binding as against such interests."

And it is explained at page 220 of Tentative Draft No. 5 dated March 15, 1934, referring to what was then Section 224. After discussing the state of the English and American decisions and statutes, and pointing to the paucity of authority, the comment concludes as follows:

> "The powers of equity have shown such expandability in the past for the meeting of newly realized

needs that it does not seem wise on the existing state of authority to deny the existence in equity of power to appoint a guardian *ad litem* to represent the interests limited in favor of unborn persons. The Caveat to Comment *e* leaves this as a possible growing point for the future."

The Fourteenth Amendment neither commands[19] nor forbids change or growth[20] in a state's substantive or adjective law. Such growth has been taking place and all in a single direction. Numerous states have adopted the expedient of a guardian or trustee for furnishing representation to the unborn, some through an exercise of inherent equity power and others through statutory enactment.[21]

Massachusetts, whose courts have no inherent equity power and must depend entirely upon statute for the source of jurisdiction (see 5 Law Q. Rev. pp. 370, 384-6), has upheld such legislation upon considerations which are equally applicable to the exercise of the same power by courts needing no such aid. The constitutionality of such a statute was specifically upheld in 1862 in *Clarke v. Cordis*, 4 Allen 466, 474-6, and its philosophy, expressed before the enactment of the Fourteenth Amendment, was held in *Copeland v. Wheelright*, 230 Mass. 131, to be equally applicable thereto.

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[19]*Ownbey v. Morgan*, 256 U. S. 94, 112.

[20]*Twining v. New Jersey*, 211 U. S. at 101, 106.

[21]It is immaterial, of course, whether the state speaks through its legislature or its courts in defining its general law. See *Erie R. Co. v. Tompkins*, 304 U. S. at 78.

A like representation under statutory authority was upheld in *Gunnell v. Palmer,* 370 Ill. 206. If statutory basis for the appointment were needed, it would be found in Section 187 of the California Code of Civil Procedure, which is quoted *supra;* it implements the constitutional grant of equity power to the Superior Courts (Const., Art. VI, Sec. 5).[22]

And the validity of such appointments in the exercise of inherent equity power has been specifically adjudicated in *Lewis v. McConchie,* 151 Kan. 778; *Ward v. Ward,* 153 Kan. 222; *Robinson v. Barrett,* 142 Kan. 68; *Lyman v. Lyman,* 293 Pa. 490.

Sec. 182 of the Restatement says:

> "A judicial proceeding has binding effect as against the future interest limited in favor of a person who was unborn at the time of the commencement of such proceeding when the requirements stated in some one of the Clauses of this Section are satisfied, but not otherwise; * * * (b) Such person was duly represented by a guardian *ad litem* appointed to protect the interests limited in favor of unborn persons."

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[22]The growing use of this type of representation argues its consonance with modern and enlightened concepts of due process. See Cal. Land Title Law (1915), Sec. 13, quoted in Petition footnote on page 4; Uniform Trustees' Accounting Act (1936), Sec. 9 (9 U. L. A., p. 706); Soldiers and Sailors Civil Relief Act of 1940, Sec. 200, Subd. 3 (50 U. S. C. A., App., Sec. 520, Subd. 3, p. 116).

The court itself protects the interests of the unborn in proceedings on the probate side concerning testamentary trusts. Cal. Pro. Code, Sec. 1123: "A decree rendered under the provisions of this Chapter, when it becomes final, shall be conclusive upon all persons in interest, whether or not they are in being"; and see Ringwalt v. Bank of America etc. Assn., 3 Cal. (2d) at 685.

The instant decision conclusively establishes that the California court has inherent power to appoint such a guardian *ad litem* (see footnote 18, *supra*). We are thus within the exact rule of the Restatement, whose purpose is "to state the existing principles of the common law as they have been developed by the courts up to this time" (The Restatement in the Courts, 4th Ed., p. 9).

> "It purports to accurately reflect the general common law of the United States, and where there is a conflict, to state the general and better rule on any given subject." (*Canfield v. Security-First National Bank*, 13 Cal. (2d) 1, 31.)

The record shows that Mr. Mathes testified to the fairness of the compromise and argued and cited authorities in support thereof [R. 538]. The trial court found:

> "that all persons interested or who at any time in the future may or might be or become interested in said trust referred to and described in said petition to compromise and in its assets and properties, including the unborn and unknown remaindermen thereof, were and are duly and regularly represented and protected in this action and proceeding, and were and are before the court for all purposes thereof, and were and are virtually and actually represented therein." [R. 519.]

And the appellate court:

> "The answer to this argument is equally persuasive. It is that courts may be safely entrusted with the protection of rights of unborn remaindermen. And it is in cases of this sort, in which there is jurisdiction in equity of the controversy, that such rights are protected by the courts themselves. In the present case we can confidently assume that this duty was performed by the trial court." [R. 608.]

We submit that this representation of the unborn in and of itself supplied all the requisites of due process as defined in the *Hansberry* or any other applicable decision.

We do not rely upon the appointment of the guardian *ad litem* to *create* jurisdiction over the interests of the unborn, as contended at Petition page 25. We have shown that it concededly existed prior to filing Petition to Compromise and that the guardianship was then adopted as one of three methods of effectuating full and fair representation of those interests. But if it were true that this appointment was a means of acquiring jurisdiction, that would be immaterial, for Sec. 187 C. C. P. has been held to sanction new devices for obtaining jurisdiction over the interests of persons interested in pending proceedings.[23]

The Application at Bar of the Doctrine of Virtual Representation Constituted Due Process.

Absence of Hostility, Not Identity of Motives, Is the Test.

The California courts have here applied the rule of Restatement concerning virtual representation. It says in Sec. 184 that the necessary prerequisites for representation of the unborn exist when the party to the action "(d) has an estate for life in land[24] and the limitation of the interests subsequent to such estate for life is in favor

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[23]See *Estate of Smith*, 4 Cal. App. (2d) 548; *State v. District Court*, 90 Mont. 213, 221-2.

[24]Subdivision (e) makes the same rules applicable to personalty.

of unborn issue of the person joined." Comment f at page 745 is as follows:

> "f. Rationale of Clause (d). Under the rule stated in clause (d) the owner of an estate for life is permitted to represent the interests of his unborn issue. The fact that the representative has only an estate for life tends to make the protection accorded through such a representation less substantial than in the situations described in other clauses of this section. This fact is offset, however, by the fact that a parent having a small interest in his own right normally can be depended upon to defend adequately the interests also limited to this issue. In this combination of circumstances rests an assurance of protection at least equal to that furnished by the more substantial interest had by the representative under the other clauses of this section."

Sec. 185 of the Restatement says:

> "The conduct of the person joined as a party constitutes the 'sufficient protection' required in Sec. 181(b) (iv) and Sec. 183(c) for the representation of living or unborn persons *whenever it does not appear affirmatively that such person acted in hostility to the interest of the person claimed to have been represented by him.*"

Comment b, at page 747, develops the thought of necessary affirmative showing of hostility as follows:

> "The sufficiency and effectiveness of a representation are not necessarily diminished by proof that facts and contentions not brought forth by the representative would have caused a different judgment or decree more beneficial to the interest of the person represented. Evidence as to either the inactivity of

> the representative or the inadequacy of his conduct is material only as it conduces to establish the hostility of the conduct of the representative to the interest of the person represented. The binding force of the judgment, decree or other result is not impugned by proof that the representative was negligent, or unaware of the effective mode of procedure for the protection of the interests limited in favor of himself and of the represented person."

This exposition of the law does not square with petitioner's contention at page 19 that "It is not sufficient that the parties have no direct hostility toward each other. *It is imperative that they must have the same impelling reasons for acting.*" (Emphasis by author.)

Professor Roberts' article, cited at Petition page 17, says at page 591:

> "The true rule would seem to be that, given the requisite community of interest (which includes absence of actual adverse interest in the particular proceeding), the absent members of the class are bound by the appearance of the representative, whatever the extent of his activities in the conduct of the litigation, so long as they are not affirmatively hostile to the interests represented."

An Ancient and Uniformly Recognized Procedure.

The rule thus defined is the established standard. It accords with that already prevailing in California (*Gorman v. Russell*, 14 Cal. 531, 539; *County of Los Angeles v. Winans*, 13 Cal. App. 234; *Curran v. Pecho Ranch & Stock Co.*, 95 Cal. App. 555) and is a time-honored procedure. See *Reynoldson v. Perkins*, at page 61, *infra*. The doctrine of virtual representation was

developed as early as the year 1701 (see Notes in Ann. Cas. 1913C, p. 65, and 2 Ann. Cas. 790). It has been repeatedly recognized and applied in the Federal Courts.[25]

But counsel would create a constitutional question out of asserted error in a rule which has prevailed for over two hundred years, forgetting that the Fourteenth "amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."[26] Indeed, the very antiquity of the rule establishes its harmony with due process.

Mr. Justice Holmes, deciding a party wall controversy under the laws of Pennsylvania,[27] said:

> "The 14th Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it, as is well illustrated by Ownbey v. Morgan, 256 U. S. 94, 104, 112, 65 L. Ed. 837, 843, 846, 17 A. L. R. 873, 41 Sup. Ct. Rep. 433." (p. 31)

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[25] *Smith v. Swormstedt,* 16 How. 288, 302-3; *Knotts v. Stearns,* 91 U. S. 638; *McArthur v. Scott,* 113 U. S. 340; *Miller v. Texas & Pacific R. Co.,* 132 U. S. 662; *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356, 366-7; *Hartford L. Ins. Co. v. Ibs,* 237 U. S. 662, 666, 672.

[26] *Minor v. Happersett,* 88 U. S. 162, 171.

[27] *Jackman v. Rosenbaum Co.,* 260 U. S. 22.

The cited case of *Ownbey v. Morgan* dealt with the Delaware attachment statutes. Concerning the matter now in hand, the opinion said:[28]

> "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, * * *.
>
> "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the 14th Amendment furnishes a universal and self-executing remedy."

Intrinsic Fairness of the Virtual Representation at Bar.

The California courts have found as a fact an absence of disqualifying hostility or adverse interest. When we consider that the infant life tenants, who were held to be competent virtual representatives, were not acting for themselves but through Mr. Hartke as guardian appointed by the court, the adequacy of the representation of the unborn becomes increasingly clear, for Mr. Hartke, as guardian *ad litem,* could only recommend a compromise to the court; he could not make it himself; the compromise at bar was made on their behalf by the court and the court alone.

Manifestly there was no possible incentive for the court or its agent, the guardian, to neglect the interests of the remaindermen in passing upon this compromise, remaindermen who now exist only in the loins of the

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[28]256 U. S. at 111-12.

life tenants. The basic philosophy of virtual representation is this: That the presence of one whose interests are such that he will normally advance the interests of the absentees in the same manner and to the same degree as his own, operates as an adequate protection of the interests of the absentees and therefore serves as a vicarious presence on their part. Certainly the status of Mr. Hartke as guardian *ad litem* in the instant situation fully measures up to this basic criterion.

Mr. Hartke and Mr. Mathes testified

> "that in their opinion and in the opinion of each of them the proposed compromise was to and for the best interests of the minors and other persons, born or unborn, in whose behalf they, the said witnesses, respectively, appeared, actually or purportedly, as guardians ad litem." [R. 538.]

and both of them "argued and cited authorities in favor and in support of said petition to compromise" [R. 538].

The soundness of their opinion is exemplified by a fact which petitioner stresses. Under the trust as drawn there would be a presumptive hiatus of thirteen (or eleven)[28a] years during which the children of Mr. and Mrs. Garland would receive no income whatever (see Petn. p. 20); under the compromise receipt of 25% of the income during that entire period was assured to these life tenants; but that change also inured to the benefit of issue of a

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[28a]See pages 45, 49, *infra*.

deceased life tenant, for such issue would be otherwise without any income during that period just as his parent would have been [R. 76]. Alzoa May was sixteen years old [R. 543]; should she die at the end of the twenty year period, at age twenty-eight (through influenza, bombing, child birth or other cause), leaving issue, the latter would enjoy or miss the assured income over the following eleven (or thirteen) year period depending upon the consummation or the rejection of the compromise. And this change was urged in the petition as a benefit to the "minor children of plaintiff and said defendant Alzoa Scott, *and their successors*" [R. 555], obviously referring to issue as "successors".

The compromise was necessarily made upon the basis of the parties' best appraisal of the unknown and unknowable events of the future. They could deal only in probabilities and possibilities. The probabilities could be best weighed in the light of the past and the future measured according to experience, namely, the American Experience Table of Mortality or similar experience table. A consideration of the prospective results of the compromise, viewed in the light of the then existing probabilities and possibilities, abundantly sustains the court's finding in the premises.[29]

It was stipulated that the book value of the corpus of the trust as of September 20, 1939, was $1,193,824.29

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[29]In the interests of simplicity and clarity we have omitted mention of surviving spouses of issue of William and Alzoa.

[R. 537]. The appellant's return to the petition to compromise averred that "The income from the trust over the last eighteen months has averaged approximately $2300 per month" [R. 569].[30]

Assuming a trust worth $1,200,000, yielding $2300 per month, the trust had an annual net income of $27,600 (or 2.3%)[31] which would be distributed as follows:

UNDER ORIGINAL TRUST.

	First 5 Years	Second 5 Years	Third 5 Years	Fourth 5 Years	After 20 Years
Alzoa	$15,000	15,000	15,000	15,000	15,000
Four children	6,000	7,200	9,000	12,600	0
William J.	6,600	5,400	3,600	0	12,600

UNDER COMPROMISE.

On basis of 2.3% the trust of $1,080,000 ($1,200,000 minus $120,000) would yield an annual income of $24,840, of which

Alzoa	would get	$9,315
Four children	would get	6,210
William J.	would get	9,315

The computations mentioned in the opinion below and reproduced in the Appendix hereto are based in part upon admissions in the state court briefs. We assume

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[30]This is an admission which binds the trustee and renders it eminently fair to adopt its figure as an income basis for appraising the future. (20 Am. Jur., Sec. 630, pp. 532-3; 10 Cal. Jur., Sec. 310, p. 1062.) True, it was not known that the income would not vary but we are dealing with probabilities and the continuity of an income fixed for eighteen months is as stable a factor as any other which must be taken into consideration.

[31]There is no factual basis for petitioner's argument (Petn. p. 18) built upon an assumed rate of 4%.

an expected duration of the trust for 48 years because the youngest child was at the time of the compromise eleven years of age [R. 543] and his expectancy, according to the American Table, was 48.08 years. It may be that the joint expectancy of the four children was longer than that, but 48 years fairly serves the purpose in hand. We have assumed for Mr. Garland an expectancy of 23 years. Mr. Hartke in his brief as guardian *ad litem* asserted that Mr. Garland died in July, 1940, at the age of 47 years; this was shortly after the compromise hearing [November 1, 1939; R. 516] and the expectancy at age 47 is 23.08 years. The petition herein gives 25 years (p. 20). We have adopted 23 years as a fair expectancy under the circumstances.

The results of varying assumptions are as follows:

1. Assuming that Mr. Garland lived his full expectancy of 23 years from date of compromise, that Alzoa and the four children survived him, which seems to be the normal assumption, it appears that the four children, the life tenants, would ultimately surrender $294,570 through the compromise, while the unborn remaindermen would give up but $120,000.[32]

2. If it be assumed that Alzoa dies at the end of 12 years from the compromise date but that William lives his full 23 year expectancy, the four children would surrender through compromise $178,980, as contrasted with the remaindermen's $120,000.

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[32]The method of reaching the various results here stated is set forth in the series of examples incorporated in the Appendix to this Brief.

3. If both Alzoa and William had lived 13 years after the date of compromise, the four children would have received under the compromise and during the remaining 35 years of the presumptive term of the trust $422,625 less than they would have received under the original trust, while the remaindermen yielded $120,000 which would not be coming to them for 48 years. The children would thus surrender $12,075 a year or an annuity of that amount. The present worth of such an annuity on a 2½% basis for a term of 35 years is $279,477.08, while the present worth of a flat sum of $120,000 due 35 years hence is $50,564.40 on a 2½% basis.

4. Upon the hypothesis that William dies immediately after the compromise and that Alzoa survives the entire 48 year trust expectancy, the four children would give up by way of compromise $306,720 as against the remaindermen's $120,000; and in that event William's death would have immediately increased the corpus to the extent of $174,950 [R. 537] or $54,950 more than the remaindermen surrendered.

This $306,720 is the aggregate amount of an annuity of $6390 for a period of 48 years surrendered by the four children. Such an annuity on a 2½% basis has a present worth of $174,170.74, while the present worth of $120,000 due in 48 years (at 2½%) is $36,680.52.

5. Assuming the immediate death of William and continued life of Alzoa for 10 years thereafter, the four children would surrender, through compromise, income aggregating $522,750, to be compared with the remaindermen's $120,000.

6. Assuming William's immediate death and Mrs. Scott's survival for a period of 20 years after the compromise, the four children would yield $465,900 in income through the compromise, while the remaindermen would yield but $120,000.

7. Assuming that Alzoa dies immediately after the compromise but that William lives his full 23 year expectancy, the four children would then surrender income aggregating $67,200 under the compromise, while the remaindermen give up $120,000. This is the only instance in the seven examples in which the children would surrender less than the potential grandchildren.

8. The eighth example of the Appendix illustrates the working of the compromise with respect to the issue of a deceased child.

Alzoa Scott Was Competent to Represent Her Unborn Grandchildren in the Compromise Proceeding.

Though the District Court did not find it necessary to pass upon the point [R. 605], Mrs. Scott remained throughout the proceeding a competent virtual representative of the unborn contingent remaindermen. Actually the compromise contains in it no element hinting at affirmative proof "that such person acted in hostility to the interest" of the unborn which is required by Sec. 185 of the Restatement. Nor does the record lend any support to the claim that Mrs. Scott "raided the interests of the unborn" (Petn. p. 19).

In the first place (disregarding for the moment the $60,000 cash which she is to receive), Mrs. Scott surrendered income amounting to $5685 a year (the difference between $15,000 and $9315). In 23 years this

would amount to $130,755, or more than $10,000 in excess of the remaindermen's contributions. If she should live 40 years her surrender of income would amount to $237,400.

Secondly, she rendered her grandchildren as well as her children a tremendous service in negotiating a compromise which would eliminate the presumptive hiatus of 11 years in income,[33]—the 20 year period for fixed income to children and their issue would elapse in 1951 and Mr. Garland's expectancy would expire in 1962. As appears from First Example in the appendix it is fair to assume that during this 11 year period the four children *or their issue* would receive $68,310 under the compromise as opposed to no income whatever under the original trust.

So far as concerns the $60,000 cash to Mrs. Scott, for approximately two years she actively conducted the defense of the trust against an attack seeking to completely destroy it (the trustee was insistently contending that it did not represent the remaindermen), and indeed for another year and a half after Mr. Hartke's appointment as guardian *ad litem* for the children she continued to actively resist the attack of the plaintiff. While the court reserved jurisdiction to award expenses and attorneys' fees to the trustee and to the guardians *ad litem* [R. 528], no such reservation was made for the benefit of Mrs. Scott. Normally the expense of the defense of such an action should be paid out of corpus (*Estate of Gartenlaub*, 185 Cal. at 655). And indeed Mrs. Scott

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[33]Petitioner gives it a duration of 13 years (p. 20).

is not through with her burden, for the trustee by filing the instant petition has added additional expense to Mrs. Scott as well as to others. Considering the value of the subject matter, the intricacy of the questions involved and the unremitting zeal of the trustee in opposition to the compromise, it seems but a fair inference that Mrs. Scott will realize for herself no part of the $60,000 and that it will be consumed in costs of litigation.

Nor is it improbable that this litigation, pursued to the bitter end by the trustee, may require her to invoke the provisions of Section 8 of the trust [R. 79], whereunder the trustee is *obligated*, should she "be in want of additional moneys for expenses of accident, illness and/*or other misfortune*." to disburse to her such portion of the corpus as may be necessary to meet her want not exceeding $50,000.00

Fact of Compromise Does Not Preclude Virtual Representation.

The claim at petition page 27 that *County of Los Angeles v. Winans* holds that virtual representation cannot concur with a consent judgment or a compromise is misplaced; and this is established as a matter of state law by the decision of the District Court of Appeal in this case. The language of the *Winans* decision is confusing but it was satisfactorily explained to the state courts and shown to be opposed to the actual holding in *Curran v. Pecho Ranch and Stock Co.*, 95 Cal. App. 555, wherein the point, though not discussed in the opinion, was elaborately argued in the briefs and the court held the virtual representation to be sufficient notwithstanding the fact of default.

Comment b to Sec. 185 of the Restatement says at page 746:

> "The representative may have been an infant or a lunatic. The representation can be as effective when the representative defaulted in the judicial proceeding as when he contested such proceeding with great vigor. *The representation also can be effective when the representative consented to the judgment, decree or other result reached in the judicial proceeding.*"

And the California annotation at page 126 says:

> "*A default suffered by the guardian ad litem for living minor remaindermen will be binding upon unborn remaindermen where the latter are sufficiently represented by those in being.* Curran v. Pecho Ranch & Stock Co. (1928), 95 Cal. App. 555, 273 P. 126."

Hansberry and Riley Decisions Afford No Support to Petitioner's Contentions.

Even if it were concluded that the California courts erred in applying the rule of virtual representation, factually or otherwise, that would not amount to a denial of due process, for "the 14th amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions * * * any more than, in guaranteeing due process, it assures immunity from judicial error * * *." (*Milwaukee etc. Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. at 106.)[34]

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[34]See, also, *Riley v. Worcester County Trust Co.*, 89 Fed. (2d) 59, 66; *Neblett v. Carpenter*, 305 U. S. 297, 302; *Bell Tel. Co. v. Penn. P. U. Com.*, 309 U. S. 30, 32.

Hansberry v. Lee, 311 U. S. 32, clearly recognizes that this sort of vicarious presence constitutes due process of law. The opinion must be read in the light of the real question presented, which did not involve virtual representation of the unborn but did concern the binding quality of judgments rendered in class or representative suits where the absentees are living persons. The state court judgment which was held to have denied due process was redolent with the fragrance of collusion in an attempt to adjudicate as against Negro property holders the validity of restrictions which were in fact void. This court held that the owners in a subdivision have not a common interest in the enjoyment of restrictions such as constitutionally to authorize one to "stand in judgment" for another in litigation concerning such restrictions, and carefully limited its ruling to the peculiar facts in hand: "We decide only that the procedure and the course of litigation sustained here by the plea of *res judicata* do not satisfy these requirements" of due process (p. 44).

After announcing the rule for class suits, the court said at page 42:

> "It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit. Nevertheless there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members

of the class who are not formal parties to the suit. Here, as elsewhere, *the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits* (citing cases); *nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts.* With a proper regard for divergent local institutions and interests (citing cases), this Court is justified in saying that *there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.* (Citing cases.)

"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, * * * or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. (Citing cases.)" (pp. 41-43)

See also cases cited in footnote 25, *supra.*

Riley v. New York Trust Co., 315 U. S. 343, neither adds to nor detracts from the *Hansberry* ruling. The majority opinion is devoted to the full faith and credit clause of the Constitution and the concurring opinion of the Chief Justice rests upon the basic holding that the New York administrator "was not a party to the Georgia proceedings, nor was he represented by any of those who were parties"; that his interest was adverse to those who were parties and hence "To have bound him by represen-

tation of those so adverse in interest would have been a denial of due process" (p. 356).

These cases require only a proceeding which "fairly insures the protection of the interests of absent parties". Here we have continued and fair representation by five life tenants—potential parents and grandmother—four of them acting through a guardian whose true status is adviser to the court; we have another guardian *ad litem* appointed specially to protect the interests of the absentees, and we have the unrelenting insistence of the petitioner that the compromise is unfair to them. No more could be asked except that the wheels of justice stand still for an indeterminate period. The *Hansberry* decision is in nowise opposed to the proposition that: "Because the parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated" [R. 604].

The Trustee's Representation of the Unborn Remaindermen Is Alone Sufficient to Sustain the Jurisdiction of the Court.

In an attack upon a trust the trustee is charged primarily with the duty of representing the interests of unknown and unborn beneficiaries.

Sec. 186 of the Restatement:

> "A person, unborn at the time of the commencement of a judicial proceeding, to whom a future interest as the beneficiary of a trust has been limited is duly represented in such proceeding when the trustee of such trust is competent, under the rules of law of trusts, to represent such possible future beneficiary in such proceeding, and is duly joined as a party in such proceeding."

Chancellor Pitney in *Woolsey v. Woolsey*, 78 N. J. Eq. 517, said:

> "Where courts have to deal with property whose ultimate destination is in doubt, and which may upon a certain contingency go to persons not yet *in esse* or not yet ascertained, they must perforce proceed without the attendance of such persons, or not proceed at all. *It results that such contingent interests are held to be bound, if the interest be represented in the litigation by a trustee or* (in some cases) *by the predecessor in estate.*"

To the same effect see:

Burgess v. Nail, 103 Fed. (2d) 37;

DuPont v. DuPont, 18 Del. Ch. 316;

Temple v. Scott, 143 Ill. 290;

Bennett's Guardian v. Cary's Executor, 210 Ky. 725;

Watkins v. Bryant, 91 Cal. 492;

Johnson v. Curley, 83 Cal. App. 627;

Green v. Grant, 143 Ill. 61;

American Bible Society v. Price, 115 Ill. 623;

Perkins v. Burlington L. & Imp. Co., 112 Wis. 509.

Indeed, it was the absence of a trustee which caused a reversal of *McArthur v. Scott*, 113 U. S. 340; see explanation in *Miller v. Texas & Pacific Co.*, 132 U. S. at p. 671.

Obviously it is a question of state law whether the trustee "is competent, under the rules of law of trusts, to represent such possible future beneficiary in such pro-

ceeding"[35] and petitioner, in arguing the contrary (pp. 22-23), presents no Federal question.

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. (Citing cases.)
>
> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (*West v. American Tel & Tel. Co.*, 311 U. S. 223, 236-37.)

Counsel, who initially recognized and asserted the trustee's right and duty to protect the interests of unborn contingent remaindermen under the saction of *Gray v. Union Trust Co.*, 171 Cal. 637 [R. 375], now misinterpret the California decisions. The *Gray* case establishes that the trustee has an imperative duty in an attack upon the trust by the trustor to protect the interests of the unborn. To the same effect is *Estate of Hubbell*, 121 Cal. App. 38. The cases of *Eakle v. Ingram*, 142 Cal. 15, and *Moor v. Vawter*, 84 Cal. App. 678, hold that the trustee has no interest in the proceeding when

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[35]There is no Federal general common law (*Erie R. Co. v. Tompkins*, 304 U. S. 64, 78) or substantive equity jurisprudence (*Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202, 205).

all the beneficiaries are *sui juris* and before the court; and *Hutchins v. Security Trust and Savings Bank*, 208 Cal. 463, and *First National etc. Bank v. Superior Court*, 19 Cal. (2d) 409, that the trustee does not represent any living beneficiaries in such litigation.

The three classes of cases read together spell but one result, namely, that in an attack by the trustor upon the trust the trustee does not represent the living beneficiaries, it cannot complain of a termination where all beneficiaries are present, *sui juris*, and consenting, but that it does represent the unborn and unknown and represents them alone in this type of litigation; that petitioner herein, as trustee, was "competent, under the rules of law of trusts, to represent such possible future beneficiary" as a matter of state law and that its actual representation of the unborn at bar concludes them through the judgment.

Trustee's Claim That Its Refusal to Consent to Compromise Destroys Court's Jurisdiction.

Petitioner challenges the authority of the court to control its discretion in the premises. At Petition page 22 counsel say:

> "If respondents here desire to depend on the trustee for jurisdiction by representation, they must accept the trustee's refusal to consent, and the compromise fails for want of consenting parties in so far as it purports to affect the property of the remaindermen."

But the trial judge overruled the contention and found:

> "that the defendant Title Insurance and Trust Company as trustee of said trust should be instructed and directed to act and perform its duties in con-

> formity with said declaration of trust as so modified, reformed and revised" [R. 521];

and ordered the trustee as well as the other parties to the action, "to abide by, perform and carry into immediate effect said compromise and each and all of the terms thereof" [R. 522]. See also R. 527.

And the ruling was eminently sound.

> "A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but *may be controlled by the proper court if not reasonably exercised*, unless an absolute discretion is clearly conferred by the declaration of trust." (Cal. Civil Code, §2269.)

Directly in point is *Rose v. Southern Michigan Nat. Bank,* 255 Mich. 275, 278-9, wherein the court affirmatively compelled a testamentary trustee to accept a compromise over its own refusal so to do.

To the same effect are:

Wolf v. Uhlemann, 325 Ill. 165, 173, 184;

Reynolds v. Reynolds, 208 N. C. 578;

Spencer v. McCleneghan, 202 N. C. 662.

In *New York Life Ins. and Trust Co. v. Conkling,* the court said at page 642 of 144 N. Y. S.:

> "But the court never hesitates to exercise its equitable powers in directing a trustee to use a portion of the trust property, if it becomes necessary, in order to protect the balance."

It is also argued that the court has no such power because a compromise is "consensual bargaining" (Petn. p. 27). But, so far as concerns an infant or unborn party, this is equally true of a judgment cancelling the trust for fraud, for a judgment is a contract of the highest order (*Gould v. Superior Court,* 47 Cal. App. 197, 200; *Jones v. Union Oil Co.,* 218 Cal. 775, 778). In the case of a judgment terminating the trust, the court makes the contract for the parties who are not *sui juris* just as in the case of a compromise. Clearly this argument is misplaced.

We have shown in our preliminary statement that the petitioner has affirmatively recognized the established principle that a trustee must represent unborn beneficiaries; that it has vigorously and ably waged a battle upon the merits of the compromise from the standpoint of the contingent remaindermen. Such complete representation binds the beneficiaries, as does any other case of competent trustee representation. One who has been thus protected through his legally constituted agent cannot assert that he has not had due process of law.

III.

Unborn Contingent Remaindermen Do Not Own Any Property and Hence There Is No Subject Matter Upon Which the Fourteenth Amendment Can Operate.

Heretofore we have discussed this case as if the unborn contingent remaindermen were on a parity with living owners of a vested remainder. But this is a gratuitous assumption made only for convenience of discussion. These unborn contingent remaindermen may never come into existence. At present they exist in the loins of the infant life tenants [the oldest aged sixteen; R. 543] whose mere volition may determine the existence or non-existence of such remaindermen. And the "estate" of these potential remaindermen is not an estate at all. The lower court decided that "they are all contingent remaindermen" [R. 599]. This, of course, connotes in this instance a lack of vesting.[36]

The so-called estate of unborn contingent remaindermen is a mere floating expectancy or possibility.[37] The "estate" is not in existence and may never be; the takers are not living and may never be born. Such an expectancy can hardly be termed "property" of the unborn,

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[36]See Civil Code, Secs. 694 and 695 quoted at pages 9-10, *supra.*

[37]See Restatement of Law of Property, Sec. 157, at pp. 563-4, and Cal. Ann. at p. 87, Comment w; *Estate of Whitney,* 176 Cal. 12, 18; *Estate of Troy,* 214 Cal. 53, 58; *Robinson v. N. Y. Life etc. Co.,* 133 N. Y. S. 257, 262-3; *Shindler v. Robinson,* 135 N. Y. S. 1056, 1060-61, 150 App. Div. 875, 880; *Du Bois v. Judy,* 291 Ill. 340, 347; *Hawkins & Roberts v. Jerman,* 147 Ore. 657, 664; *Mercer v. Downs,* 191 N. C. 203, 205; *Riverside Tr. Co. v. Twitchell,* 342 Pa. 558, 564; 31 C. J. S., Sec. 72, p. 91.

or "owned" by them (see 33 Am. Jur., §72, p. 532; 31 C. J. S., §81, p. 95).

In *Reynoldson v. Perkins,* Amb. 564; 27 Eng. Reprint 362, 363, decided in 1769, it is said with respect to contingent remaindermen:

> "Lord Chancellor was clear of opinion, that the plaintiff was not entitled to redemption. That the first tenant in tail being a party to the bill of foreclosure was sufficient. That he sustained the interest of everybody, and *those in remainder were considered as cyphers.*"

And in *Knotts v. Stearns,* 91 U. S. 638, 640:

> "The posthumous child did not possess, until born any estate in the real property of which his father died seised which could affect the power of the court to convey the property into a personal fund, if the interest of the children, then in being, or the enjoyment of the dower right of the widow, required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition."

This type of contingent remainder differs materially from one owned by living persons (*County of Los Angeles v. Winans,* 13 Cal. App. 257, 260; and see cases in footnote 37).

The Fourteenth Amendment does not deal with abstractions or mere fictional concepts (see *Curry v. McCanless,* 307 U. S. at 374) or with "supposed rights of property which the state courts determine to be nonexistent" (*Fox River Paper Co. v. R. R. Com.,* 274 U. S. at 657). It

protects only vested rights[38] which *ex vi termini* excludes interests wholly contingent as at bar. "Constitutions are intended to preserve practical and substantial rights, not to maintain theories" (Holmes, J., in *Davis v. Mills,* 194 U. S. 457).

Such contingent rights may be altered without offending the Fourteenth Amendment or its due process clause.[39]

Copeland v. Wheelright, 230 Mass. 131, upheld a compromise of an estate controversy which completely annihilated the rights of the unborn contingent remaindermen, and did so from the standpoint of due process.

The trustee's own title is not such as the Amendment protects (*In re North Jersey Title Ins. Co.,* 120 N. J. E. 148, 155-6; *Williamson v. Suydam,* 6 Wall. 723, 738). This being the case, petitioner's claim of denial of due process is reduced to a series of speculations as to what may eventuate if any unborn contingent remaindermen should come into being, should survive all the life tenants, thus divesting the estate of Grace Garland and Jane Mary Garland and for the first time acquiring an estate of their own, and if they should then deny the binding effect of the instant judgment, should sue the trustee

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[38]Defined in *Pearsall v. Great Northern R. Co.,* 161 U. S. at 673.

[39]2 Cooley's Const. Lim. (8th Ed.), pp. 749-54; McGehee, Due Process of Law, p. 157; Note in 19 A. L. R. 247; *Jennings v. Capen,* 321 Ill. 291, 296-7; *Butterfield v. Sawyer,* 187 Ill. 598, 601; *Anderson v. Wilkins,* 142 N. C. 154, 157; 6 R. C. L., Sec. 303, p. 316; *Irving Trust Co. v. Day,* 314 U. S. 556, 562.

and fasten personal liability upon it for acts done under the coercion of a final decree of a court having jurisdiction over the trustee and the trust estate.

This court does not waste its time on such a multiplication of contingencies and their possible effects.

In the present instance the claim of denial of due process is no better than frivolous.[40] The petition should be denied.

Respectfully submitted,

GURNEY E. NEWLIN,

ALLEN W. ASHBURN,

Solicitors for Respondent Harry C. Mabry, as Executor of the Last Will and Testament of William J. Garland, deceased.

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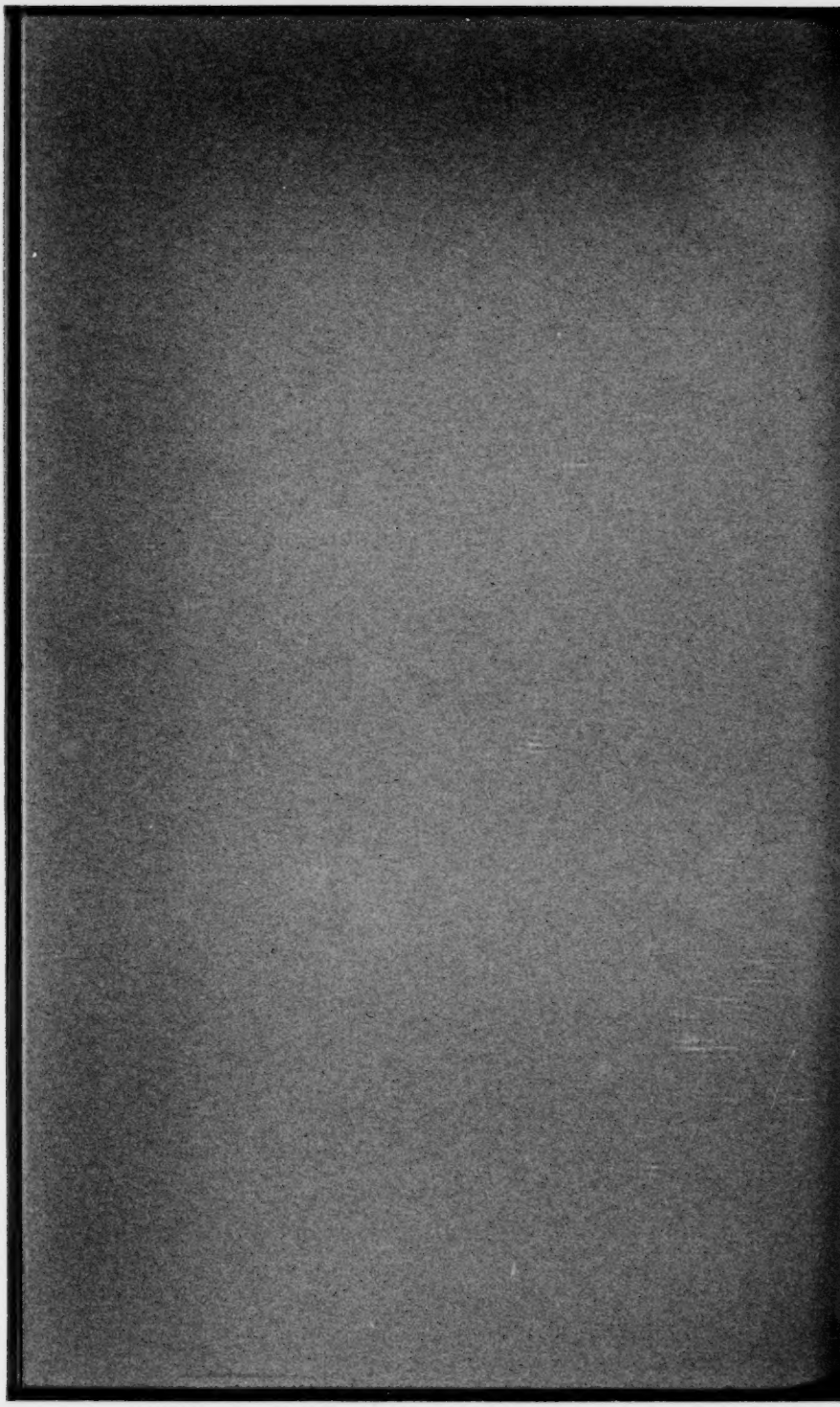
[40]See 28 U. S. C. A., Secs. 878 and 861a; *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 106; *Wagner Electric Co. v. Lyndon*, 262 U. S. 226, 233-4.



APPENDIX.

First Example.

At time of compromise, trust had been in existence for eight years; trust expectancy was 48 years because that was expectancy of youngest child. Mr. Garland's expectancy was 23 years. And the income $27,600 per annum.

Assuming that Garland lived his full expectancy and that Alzoa and the four children survived him:

Under original trust children would have received ($14,400 plus $45,000 plus $63,000) $122,400 during the remaining 12 years of their 20-year term.

Under the compromise they would receive $74,520 (12 times $6210) during that 12 years.

They would give up $47,880 for that 12-year period.

For the next 11 years, they or their issue would have received nothing *under original trust*. But *under compromise* they receive $6,210 a year, or a total of $68,310, some $20,430 more than they surrendered for the 12-year period.

During the remaining 25 years of the 48-year period (assuming Alzoa's survival), children would give up income which otherwise would have come to them through their father's death, everything in excess of $15,000, or $12,600 a year, which in 25 years amounts to $315,000. This sum less $20,430 leaves $294,570 as the net surrender of income by the four children.

The unborn remaindermen surrender $120,000 which would not mature for 48 years and which, on a 2½% basis, has a present worth of $36,680.52. We are unable

to compute the present worth of the children's share because of the eleven-year hiatus and the inapplicability of available tables.

Second Example.

Assume that Alzoa dies at the end of 12 years but that William lives his full 23-year expectancy:

The four children would have *under the compromise* for *the balance of the 48-year term* 62½% of the income ($9315 plus $6210 times 36) or $558,900, whereas *under original trust* they would have had nothing during the 11 years next following Alzoa's death (for the 20-year period would have expired and Alzoa's share would have reverted to William, who would have been entitled to everything until his death), but would have had all the income for the remaining 25 years (25 times $27,600) or $690,000; they would thus surrender $131,100, as contrasted with remaindermen's $120,000.

During the twelve years preceding Alzoa's death they would have received $74,520 *under the compromise* or $122,400 *under the original schedule*,[1] thus surrendering $47,880 for this period. Added to $131,100 we have a total yielding of income of $178,980 as against the remaindermen's $120,000.

Third Example.

Assume that both Alzoa and William die at the end of 13 years:

Then the four children would thereafter have *under the compromise* 62½% of the income ($15,525) for 35 years or $543,375, whereas they would have had it all

---

[1]See First Example.

under the original trust (35 times $27,600) or $966,000. They thus surrender for this 35 years a total of $422,625, while the remaindermen yield $120,000 which would not be coming to them for 48 years.

The present worth, at that time, of the children's surrender—a 2½% annuity of $12,075 ($27,600 minus $15,525) for 35 years, is $279,477.08,[2] while the present worth of a flat sum of $120,000 due 35 years hence is $50,564.40 on a 2½% basis.[3]

Fourth Example.

Assume that William dies immediately after the compromise and that Alzoa survives the entire 48-year trust expectancy:

Her children would have for that 48 years an income of $6,210 per year or $298,080 *under the compromise.*

Under the original trust they would have had $12,600 a year, all excess over Alzoa's $15,000. 48 times $12,600 is $604,800.

Upon this hypothesis the children would surrender an annuity of $6,390, or a total of $306,720, as against the remaindermen's $120,000.

An annuity of $6,390 for 48 years on a 2½% basis has a present worth of $174,170.74, while the present worth of $120,000 due in 48 years (at 2½%) is $36,680.52.

The death of William increased the corpus $174,950. [R. 537.]

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[2]Computed according to table at page 1742 of Paton's Accountant's Handbook.

[3]*Id.* p. 1734.

Fifth Example.

Assume that William J. Garland dies immediately after compromise and that Alzoa lives 10 years:

Her children would have *under the compromise* 10 times $6,210 equals $62,100 for the 10 years of their mother's life and then 62½% ($9,315 plus $6,210) for the remaining 38 years of the trust or $589,950, which added to $62,100 makes $652,050; to be compared with the *original schedule* of 10 times $12,600 equals $126,000 for 10 years plus 38 times $27,600 (entire income) equals $1,048,800 for balance of term, or a total of $1,174,800. Children thus surrender $522,750 as against remaindermen's $120,000.

Sixth Example.

Assume that Garland dies immediately after compromise and Alzoa lives for 20 years:

Her children would *under the compromise* receive (20 time $6,120) $124,200 for 20 years, and then 62½% ($6,210 plus $9,315) for 28 years (28 times $15,525 equals $434,700) which added to $124,200 makes $558,900. This is to be compared with *original schedule* of 20 times $12,600 equals $252,000, plus 28 times $27,600 equals $772,800, or a grand total of $1,024,800.

Upon this hypothesis the children surrender $465,900, while remaindermen yield but $120,000.

Seventh Example.

Assume that Alzoa dies immediately after compromise but that William J. Garland lives his full expectancy:

The four children would then receive *under the compromise* 62½% for 48 years (48 times $15,525) or

$745,200. *Under the original trust* they would have received $122,400 for 12 years, nothing for the next 11 years, and (25 times $27,600) $690,000 for the balance of the term. $122,400 plus $690,000 equals $812,400.

In this event they give up $67,200, while the remaindermen surrender $120,000.

Eighth Example.

Assume that William J. Garland lived his expectancy of 23 years and that Alzoa and one child died in 1943 (during the third five year period) the child leaving issue:

That issue for a period of 8 years would receive under the compromise ¼th of 62½% of the income, or 15.6%, while under the original trust it would have been confined to its share of the $750 and $1250 per month, respectively. Assuming an annual income of $24,840, 15.6% is $3875 which this issue of a deceased child would receive for 8 years, or a total of $31,000, whereas under the original scheme it would have received for this 8 year period ¼th of $750, etc., or a total of $22,500,—a difference of $8,500.

After the expiration of the 8 years, this grandchild continues to receive $3875 per annum under the compromise. It would have received under the original trust nothing between 1951 and 1962; but after 1962 (date of William J. Garland's presumed death) would have received ¼th of all the income (¼th of $27,600) or $6900 per annum.

Under the compromise the grandchild would receive 44 times $3875, equals $170,500 as income (1943-1987). Under original trust would receive $22,500 over first 8 years; nothing for next 11 years, and $172,500 for remaining 25 years ($6900 times 25), or a total income of $195,000 ($172,500 plus $22,500), a total surrender of $24,500 in income. Each surviving child would stand on same basis and make same proportionate surrender.

In addition, the grandchild contributes a right to receive $30,000 48 years hence, the present value of which, at 2½%, is $9,170.

(30)

IN THE

Supreme Court of the United States

October Term 1942

No. 379.

TITLE INSURANCE AND TRUST COMPANY, a corporation,
Petitioner,

vs.

HARRY C. MABRY, as Executor of the Last Will and Testament of William J. Garland, Deceased, *et al.*,
Respondents.

Brief of Respondent William C. Mathes, as Guardian Ad Litem, in Opposition to the Petition for Writ of Certiorari.

WILLIAM C. MATHES,
640 Rowan Building, Los Angeles,
Counsel Pro Se as Guardian Ad Litem.

MATHES & SHEPPARD,
PAUL M. GREGG,
GORDON F. HAMPTON,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles

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Brief of Respondent William C. Mathes, as Guardian Ad Litem, in Opposition to the Petition for Writ of Certiorari.

May It Please The Court:

My appointment as guardian *ad litem* by the trial court charges me with the duty of representing the interests of the unborn and unascertained remaindermen involved in the case at bar [R. pp. 578-580, fols. 1732-1739]. I therefore appear *in propria persona* in my representative capacity, to oppose the petition for a writ of certiorari to review the final judgment of the courts of California in this cause.

The petitioner's request for certiorari is predicated entirely upon the contention that here the California courts

have decided "a federal question of substance . . . in a way probably not in accord with applicable decisions of this Court". (Rule 38, par. 5(a); Petition, p. 3.) The "applicable decisions" cited by the petitioner are (1) *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940) and (2) *Riley v. New York Trust Co.*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 551, 62 S. Ct. 608 (1942).

It is submitted that no ground is presented, and none exists, for a review of the decision of the state court by this Honorable Court.

Statement of the Case.

The case is fairly stated in the opinion of the District Court of Appeal, which is reported at 51 Adv. Cal. App. 379; 124 Pac. (2d) 659 [R. pp. 599-602]. It is believed, however, that the following recital may prove of assistance.

William J. Garland created the trust in 1931, apparently at the behest of his then wife Alzoa, now Alzoa Scott. William thereafter brought this action to rescind the entire trust upon the ground of fraud, undue influence and mistake and to compel the petitioner, as trustee, to restore to him the properties he had previously conveyed to the trust [R. pp. 1-98]. An amendment to the complaint was later filed requesting the alternative relief of reformation of the trust. As thus amended, the complaint sought (1) outright rescission and cancellation of the entire trust and (2) reformation of the trust in the event complete rescission could not be had [R. pp. 337-360].

California courts long ago adopted the procedure of permitting a plaintiff in an action for rescission to seek in

the alternative some other relief such as reformation or damages, in the event the remedy of rescission should prove to be for any reason not available to the plaintiff. As the Supreme Court of the state said in *Walsh v. Majors*, 4 Cal. (2d) 384, 398, 49 Pac. (2d) 598 (1935):

> "In an equitable action for rescission . . . the plaintiff may state the facts surrounding the transaction and pray for any and every kind of relief to which under the facts he may show himself entitled . . . It has been held in such a situation that when the jurisdiction of equity attaches for any purpose it attaches for all purposes, among others, for assessing and awarding damages where damages are proper, as where rescission has become impossible, it being the duty of a court of equity to adjust all the differences arising from the cause of action presented and to leave nothing for further litigation."

To the same effect, see:

Bancroft v. Woodward, 183 Cal. 99, 101-102, 190 Pac. 445 (1920);

Montgomery v. McLaury, 143 Cal. 83, 87, 76 Pac. 964 (1904).

Alzoa, her four children, and all other living beneficiaries of the trust, were joined with the trustee as parties defendant. The trustee defended upon the ground, among others, that the unborn remaindermen were indispensable parties to the action. The court thereupon appointed me to represent the interests of the unborn [R. pp. 574-580].

All parties other than the trustee arrived at a compromise of the litigation, which they submitted to the trial

court for approval [R. pp. 540-558]. The trustee then filed a statement in opposition to the compromise, alleging that "the proposed compromise is unfair, unjust and inequitable to the unborn and unknown recipients of the corpus", and contending that the trial court not only lacked jurisdiction, but was powerless to acquire jurisdiction through the appointment of a guardian *ad litem* or otherwise, to affect the interests of the unborn remaindermen by its judgment approving any compromise [R. pp. 566-572].

After a full hearing of the matter, the trial court found, *inter alia*:

> "That there is a present substantial and actual risk to all the beneficiaries of said trust, other than plaintiff, including the unborn and unknown remaindermen thereof, if the . . . action be not compromised . . . or if the matter should proceed to trial upon the complaint and amendments to the complaint and the various answers on file thereto, in that plaintiff may prevail at the trial of said action and that the beneficiaries of said trust other than plaintiff, including the unknown and unborn remaindermen thereof, may or might lose all the benefits now conferred upon them by said declaration of trust, but under said compromise there is irrevocably saved and preserved to and for them the major portion of such benefits; that it is to the advantage of said beneficiaries of said trust, including the unborn and unknown remaindermen thereof, . . . to settle and dispose of said action on the basis of and in accordance with the agreement of compromise referred to in said petition to compromise; that the said compromise is not unfair, unjust or inequitable in any degree to the unborn or unknown recipients of the

corpus of said trust upon the termination thereof, but, on the contrary, said compromise is fair, just and equitable to, and to the best interests of, all persons now interested and all persons who at any time in the future may or might be or become interested in said trust and its assets and properties, including the unborn and unknown remaindermen" [R. pp. 519-520, fols. 1557-1560].

The trial court thereupon overruled the trustee's objections and decreed the compromise [R. pp. 516-528].

The trustee appealed from that decree to the Supreme Court of California [R. p. 533, fols. 1597-1599; p. 534, fols. 1600-1602]. After briefs had been filed, the California Supreme Court ordered the cause transferred to the intermediate appellate court—the District Court of Appeal—for hearing and determination [R. p. 612, fol. 623].[1]

The District Court of Appeal affirmed the judgment of the trial court [R. pp. 611-612, fols. 621-623]. The trustee then petitioned the California Supreme Court to hear and determine the cause, under Rule XXX (§6) of that court which provides:

"Petitions for hearing in the Supreme Court after decision by the District Courts of Appeal will be granted only when it shall appear necessary in order to secure uniformity of decision or the settlement

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[1]"The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court." *Constitution of California*, Art. VI, §4(c); [Cal. Stats. 1929, XX-XXIV; Appendix to Petition, p. 2].

> of important questions of law. Such petitions must embrace a statement of the grounds upon which such necessity is claimed to exist, otherwise the petition shall be denied."[2]

Following consideration of the trustee's petition, the California Supreme Court entered its order as follows:

> "Appellant's (Title Insurance and Trust Company) petition for hearing denied". [R. p. 612, fol. 623.]

It is informative to consider the effect under California procedure of the order just quoted. This cause being a "case in equity", the appeal was properly taken as above stated to the Supreme Court of the State in the first instance [Constitution of Calif., Art. VI, §4; Appendix to Petition, p. 1]. Accordingly, upon consideration of the trustee's petition for a hearing of the cause, the California Supreme Court was duty bound, upon the petitioner's request, "to look into the record to see whether anything deserving consideration has been overlooked in deciding the cause, or any of the facts misconceived in material particulars".

As the California Supreme Court said upon denying the petition for a hearing in *Burke v. Maze*, 10 Cal. App. 206, 211-212; 101 Pac. 438, 440-441 (1909):

> "In causes properly appealed to this court and referred by us to the district court for hearing and decision . . . if it is contended that the case stated

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[2]18 Cal. (2d) 24 (1941).

in the opinion of the district court of appeal differs materially from the case as it appears in the record, we feel bound to look into the record to see whether anything deserving consideration has been overlooked in deciding the cause, or any of the facts misconceived in material particulars. If so we order a rehearing notwithstanding the opinion of the district court may be correct on its face, because the complaining party has a right to the opinion of this court upon the precise case shown by the record."

See, also:

McDonough v. Goodcell, 13 Cal. (2d) 741-747, 91 Pac. 1035 (1939).

Moreover, it is a frequent practice of the California Supreme Court, upon denying a petition for a hearing, to "disapprove" or to "withhold approval" of specified portions of the opinion of the District Court of Appeal embodying statements as to the law which are deemed by the higher court to be erroneous or doubtful.

See:

28 *Calif. L. Rev.*, note pp. 81, 85, 88-91 (1939);
13 *So. Calif. L. Rev.*, note pp. 461, 464-466 (1940).

The California Supreme Court denied the petition for a hearing in the case at bar without comment [R. p. 612, fol. 623]; and the trustee now requests this Honorable Court to review the decision of the California District Court of Appeal.

Summary of the Argument.

The petition for a writ of certiorari to review the final judgment of the courts of California in this cause should be denied, for the following reasons:

First: The petitioner has failed to show affirmatively that this Honorable Court has jurisdiction. Specifically there has been no affirmative showing that the petitioner has or could suffer any injury as a result of the claimed denial of due process to the unborn remaindermen;

Second: It is sufficient to satisfy the requirements of due process that there was virtual representation of the unborn remaindermen; and

Third: The appointment of a guardian *ad litem* charged with the duty of representing the interests of the unborn remaindermen satisfied every possible requirement of due process.

ARGUMENT.

I.

The Petitioner Has Failed to Show Affirmatively Jurisdiction in This Court.

It is as Mr. Chief Justice Stone recently said in *Gorman v. Washington University*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 895, 897, 62 S. Ct. 962 (1942):

> "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction."

There is no question here but that this is a "cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had . . ." (§237(b), Judicial Code, as amended; 28 U. S. C. A. §344(a)). And no contention is made that the petitioner has failed to comply with the provisions of Rule 12 (par. 1) or Rule 38 (par. 2) of the Rules of this Court.

> *Southern Power Co. v. North Carolina Pub. Service Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164 (1924);
>
> *Lynch v. New York*, 293 U. S. 52, 54, 79 L. Ed. 191, 193, 55 S. Ct. 16 (1934);
>
> *Memphis Natural Gas Co. v. Beeler*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 745, 747, 62 S. Ct. 857 (1942).

It *is* submitted, however, that the petitioner stands in no position to invoke the jurisdiction of this Court by posing the constitutional question here sought to be presented. For even if it should be assumed *arguendo* that the procedure adopted by the state court fails to satisfy

the requirements of due process, the fact-to-be-faced still remains: *there has been no affirmative showing that the petitioner has or could suffer any injury* as a result of the assumed denial of constitutional rights.

In *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162, 59 L. Ed. 169, 174, 35 S. Ct. 69 (1914), this Court declared:

> "It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

In the language of Mr. Justice Black in *Voeller v. Neilston Warehouse Company*, 311 U. S. 531, 537, 85 L. Ed. 322, 326, 61 S. Ct. 376 (1941):

> ". . . this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions".

See:

Tyler v. Judges of Ct. of Registration, 179 U. S. 405, 48 L. Ed. 252, 21 S. Ct. 206 (1900);

Ashwander v. Tenn. Valley Authority, 297 U. S. 288, 347-348, 80 L. Ed. 688, 711, 56 S. Ct. 466 (1935).

The claimed unconstitutional deprivation is stated by the petitioner thusly:

> "Petitioner claimed in the state courts and claims here a right and immunity under the Fourteenth Amendment to the United States Constitution namely, that the judgment rendered by the State Court, ordering petitioner, as trustee, to pay $120,000 out of the corpus of a trust, which corpus belonged entirely to unborn and unascertained remaindermen

> who were not before the court, actually or by virtual representatives, and who therefore, were not and could not be bound by the judgment in this case, would be and was violative of the due process guaranties of said Fourteenth Amendment." (Petition, pp. 2-3.)

The alleged injury to the petitioner resulting from this asserted want of due process is sought to be spelled out as follows:

> "If the decree resulted from due process of law, the remaindermen would be bound thereby and the trustee protected in making such withdrawal and payment. But if (as the trustee has contended throughout) the procedure below was lacking in due process as to the remaindermen, the trustee will be compelled, at termination of the trust, to restore that $120,000 to corpus *out of its own funds*. Thus the trustee, petitioner herein, has a direct financial interest to the extent of at least $120,000 in the determination of this question. For this reason the trustee's own property is being taken without due process of law." (Petitioner's Br. p. 28.)

The petitioner then urges that "this case is not to be distinguished in principle" from *Buchanan v. Warley*, 245 U. S. 60, 73, 62 L. Ed. 149, 160, 38 S. Ct. 16 (1917), "where a *white* vendor was permitted to raise the constitutional deficiencies of an ordinance prohibiting occupation by a colored vendee"; or *Truax v. Raich*, 239 U. S. 33, 38-39, 60 L. Ed. 131, 134, 36 S. Ct. 7 (1915), where a state statute restricting employment of aliens was declared unconstitutional at the suit of an alien employee.

Thus the petitioner *assumes* that, even though the trustee is required to disburse the questioned $120,000 from

the corpus of the trust in obedience to the command of the highest court of the State of California, liability to remaindermen now unborn will result notwithstanding, if such remaindermen should later claim that the procedure followed by the California courts in this cause failed to satisfy the requirements of due process. *But the petitioner does not even attempt to show affirmatively that such is the law.*

The petitioner, a California corporation authorized to act as trustee in that state, appears in this cause as trustee of the Garland trust; and the orders embraced in the judgment herein are addressed to the petitioner solely in its capacity as such trustee [R. p. 521, fol. 1563, to p. 522, fol. 1566; p. 527, fol. 1579]. In the language of the California Supreme Court:

> "It has been said that the harshest demand that can be made in equity is to hold a trustee answerable . . . for a loss not caused by his willful default."
>
> *Estate of Cousins*, 111 Cal. 441, 451, 44 Pac. 182 (1896).

> "Where the trustee pays and distributes the trust fund under the direction and decree of the court, he is indemnified by the order itself, and needs no release. It would be impossible to hold any trustee responsible for obeying the orders of a court.
>
> *Perry on Trusts and Trustees* (7th Ed., 1929), Vol. II, §924, p. 1572.

See, also:

Pomeroy, Equity Jurisprudence (5th Ed., 1941), Vol. 4, §1064, pp. 179-180;

Scott on Trusts (1939), Vol. 3, p. 1903; Vol. 2, §192, p. 1046; §204, p. 1096;

Restatement, Restitution, §73;
Restatement, Trusts, §167, §178, §192, §201, §204, §220; Cal. Ann. §167, §178, §201, §204, §220.

In this cause, a portion of trust corpus is applied to effect a compromise of litigation challenging the very existence of the trust; and the payment is made by a corporate trustee in response to judicial command approved by the highest court of the state wherein the trustee is empowered to act. The likelihood that the trustee could incur liability for thus "obeying the orders of a court" would seem remote indeed.

See:

Ellig v. Naglee, 9 Cal. 683, 695 (1858);
Floyd v. Forbes, 71 Cal. 588, 594; 12 Pac. 726 (1887);
Estate of Schandoney, 133 Cal. 387, 390; 65 Pac. 877 (1901);
Estate of Wood, 159 Cal. 466, 471; 114 Pac. 992 (1911);
Moore v. Bowes, 8 Cal. (2d) 162, 166; 64 P. (2d) 423 (1937).

And possibility of injury to the trustee appears even more nebulous when it is recalled that the *res*—the trust corpus from which the $120,000 is directed by the state court to be paid—was within the jurisdiction of that court [R. p. 519, fols. 1556-1557]. Service of summons on the trustee holding the fund subjected the *res* to the jurisdiction of the trial court.

State v. Security Savings Bank, 186 Cal. 419, 427; 199 Pac. 791 (1921)
Standard Dredging Co. v. Title Insurance and Trust Co., 96 Cal. App. 93, 97; 273 Pac. 871 (1928).

Thus the case at bar is correctly characterized as a proceeding in *rem*, in so far as concerns disposition of the $120,000 from corpus of which the petitioner complains. This fact makes it even more difficult to perceive what possible constitutional right of the petitioner is infringed by the judgment of the state court decreeing compromise of the litigation.

See:

Security Savings Bank v. California, 263 U. S. 282, 287-288; 68 L. Ed. 307, 31 S. Ct. 661 (1923).

Compare:

Miedreich v. Lauenstein, 232 U. S. 236, 246-248, 58 L. Ed. 584, 590-591, 34 S. Ct. 309 (1914).

In this cause, as in *Corporation Commission v. Lowe*, 281 U. S. 431, 438; 74 L. Ed. 945, 949; 50 S. Ct. 397 (1930):

> "It was incumbent upon the appellee in invoking the protection of the 14th Amendment to show with convincing clarity that the law of the state created *against him* the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the state in enforcing its local policies will conform its requirements to the Federal guaranties. Doubts on this point are to be resolved in favor of, and not against, the state." (Italics added.)

II.

The Procedure and Course of Litigation Adopted by the California Courts in This Cause Satisfy Every Possible Requirement of Due Process.

The test of due process in this cause was stated by Mr. Chief Justice Stone in *Hansberry v. Lee, supra,* 311 U. S. 42, 85 L. Ed. 27:

> ". . . there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; . . . nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, . . . this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."

A. The Petitioner Has Conceded That the State Court Had Jurisdiction to Decree a Compromise Suitable to the Petitioner.

In the petitioner's "Return to Order to Show Cause and Answer to Petition to Compromise" filed in the trial court, the petitioner denied the jurisdiction of the court

to approve the *particular* compromise presented, but added: *"This does not mean that said action should not or may not be compromised upon a fair and equitable basis if the same can be arrived at."* [R. p. 571, fol. 1712.]

In other words, according to the petitioner, the state court had jurisdiction to decree approval of any compromise which the presumably disinterested trustee might deem proper, but no other. Thus, determination of the fairness or unfairness of the settlement would rest with the trustee, rather than the trial court. Necessarily then, the discretion of the trustee, and not that of the trial court, would control.

Now the petitioner appears to withdraw from that position. While still admitting that the state court had jurisdiction to proceed with the action to a "bitter end" judgment, the trustee now urges that there was no alternative; that the trial court did not have jurisdiction to approve any compromise, even a compromise sanctioned by the trustee. In other words, although the trust might well have been entirely destroyed had the litigation proceeded upon an all-or-nothing, win-or-lose basis, the petitioner now says there was no choice. It was either stand or fall.

Unchallenged, then, is the jurisdiction of the state court to terminate the litigation with a decree either rescinding or upholding the trust. Such equitable jurisdiction attached at the outset of the suit. The trustee concedes this also, but urges that when the parties began to talk settlement rather than fight, equity somehow lost jurisdiction.

Jurisdiction of a court of equity does not ebb and flow with the tempers of litigants [R. p. 608-609, fols. 617-619].

> "When . . . jurisdiction in equity attaches for any purpose, it is retained for all purposes . . ."
> *Montgomery v. McLaury, supra*, 143 Cal. 83, 90, 76 Pac. 964 (1904).

B. THERE WAS BOTH VIRTUAL AND ACTUAL REPRESENTATION OF ALL INTERESTS AFFECTED.

The trial court found:

> ". . . that all persons interested or who at any time in the future may or might be or become interested in said trust . . . and in its assets and properties, including the unborn and unknown remaindermen thereof, were and are duly and regularly represented and protected in this action and proceeding, . . . and were and are virtually and actually represented therein; . . . that the trustee . . . was and is before the court in this action and proceeding, and was and is subject to the jurisdiction of this court; and further that the trust . . . properties . . . are before and within the jurisdiction of this court for all purposes of this action and proceeding." [R. p. 519, fols. 1555-1557.]

These findings were adopted by the District Court of Appeal, and in effect approved by the California Supreme Court [R. pp. 607-609, fols. 615-619].

1. *It Is Sufficient to Satisfy the Requirements of Due Process That There Was Virtual Representation of the Unborn Remaindermen.*

As the court said in *Curran v. Pecho Ranch & Stock Co.*, 95 Cal. App. 555, 561-562, 273 Pac. 126 (hearing in Supreme Court denied, 1929):

> "The trial court has found that all parties interested were duly and properly represented. It is true that some of the parties hereto were not in being . . . *It is the interest which the court is considering*, and the owner merely as the guardian of that interest; *if then, some other persons are present who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required,* and the court may, without putting any right in jeopardy, take its usual course and make a complete decree. *The rule is made applicable to representation of persons living, as well as those unborn.*" (Italics added.)

The substance of the petitioner's attack upon the findings as to virtual representation is that the state courts "did not give proper consideration to the fundamental requirement that representation can only exist where *similar inducements* can fairly be expected to motivate the representative and the represented." (Pet. Brief, p. 19.)

But the trial judge and three justices of the District Court of Appeal and seven justices of the California Supreme Court found that the requisite "similarity of motive and inducement" did exist; that "the relationship between the parties present and those who are absent is

such as legally to entitle the former to stand in judgment for the latter" [R. pp. 606-607].

The petitioner relies upon *Hansberry v. Lee, supra*, 311 U. S. 32, 85 L. Ed. 22, and *Riley v. New York Trust Co., supra*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 551, 62 S. Ct. 608, but omits to point out wherein the decision of the state court in this cause is at variance with either of those decisions. The obvious inability of the plaintiff lot owner involved in *Hansberry v. Lee* to represent all other lot owners of the tract in litigating such a patently controversial matter as the validity of an agreement involving race restrictions is not open to question. Whether the interests of the absent lot owners would favor or oppose the race restrictions sought to be enforced by the plaintiff was rank conjecture. As this Court there explained:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common-right or to challenge an asserted obligation . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."[3]

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[3]311 U. S. 44-45, 85 L. Ed. 28-29.

It has been noted already that in the case at bar fraud inducing the creation of the trust was the gravamen of the charge in the plaintiff's complaint; that the plaintiff's attack was directed at the very existence of the entire trust.

In *Stewart v. Oneal*, 237 Fed. 897, 903 (C. C. A. 6th, 1917), the court observed:

> "The representation is not of the interest of such nonparties, but . . . of the questions on which their interest depend . . .
>
> "In this case the interests of the numerous defendants were identical . . . *i. e.*, to uphold the will."

So, too, in the case at bar, the interests of all defendants—the life tenants, the remaindermen, and the trustee as well—are "identical" for the purposes of the doctrine of virtual representation; *i. e.*, to uphold the trust. Certainly the interests of the life tenants are "identical" with those of the remaindermen, because there can be no income without corpus and there can be neither income nor corpus if the trust be not upheld.

See:

Akley v. Bassett, 68 Cal. App. 270, 283, 285; 288 Pac. 1057 (hearing in Cal. S. Ct. denied, 1924);

Gunnell v. Palmer, 370 Ill. 206, 18 N. E. (2d) 202, 205 (1938).

See, also:

Restatement, Property, §182, §183, §184, §185.

2. *The Trustee Was the Only Party Defendant Indispensable to Due Process in the Case at Bar.*

The cause in effect involves an action by the plaintiff as grantor against the defendant trustee as grantee to rescind and cancel a conveyance upon the ground of fraud.

The fraud charged, placed in issue the existence of a trust at all; and the plaintiff was clearly entitled to have that issue litigated. Thus, as to jurisdiction, there were only two indispensable parties to this suit: the plaintiff and the trustee.[4]

Watkins v. Bryant, 91 Cal. 492, 27 Pac. 775 (1891);

Johnson v. Curley, 83 Cal. App. 627, 257 Pac. 163 (1927);

Pomeroy, Code Remedies (5th Ed., 1929), Sec. 254

The trustee is the only party defendant indispensable to due process in any action involving defense of the title to the corpus of the trust.

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[4]This is peculiarly so in California, where Sec. 863 of the Civil Code provides that: "The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." *Estate of Troy*, 214 Cal. 53, 56, 3 Pac. (2d) 930 (1931). However, this would not be so where the dispute is factional among the beneficiaries, and does not involve an attack upon the existence of the whole trust; nor with respect to a dispute involving parties to a contract for the establishment of a trust. See: *Hutchins v. Security Trust & Savings Bank*, 208 Cal. 463, 281 Pac. 1026 (1929); *Lake v. Dowd*, 207 Cal. 290, 277 Pac. 1047 (1929); *Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145 (1906); and *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236 (1887), upon which the petitioner relies.

See:

Kerrison v. Stewart, 93 U. S. 155, 160; 23 L. Ed. 843, 845 (1876);

McArthur v. Scott, 113 U. S. 340, 396, 28 L. Ed. 1015, 1033, 5 S. Ct. 652 (1884);

Miller v. Texas & Pac. R. R. Co., 132 U. S. 662, 671-673, 33 L. Ed. 487, 494, 10 S. Ct. 206 (1890).

Indispensable parties are, of course, to be distinguished from mere *proper* parties. Although the trustee is the only indispensable party defendant, the beneficiaries may always be joined as proper parties.

Perry on Trusts and Trustees (7th Ed., 1929) Vol. I, §327.

In any suit involving, as does the case at bar, a serious and costly attack upon the very existence of the trust, no one would be heard to question the jurisdiction of a court of equity to approve—even over protests of the *cestuis que trust*—a compromise arranged by the trustee alone and calling for payment of a portion of the trust corpus in settlement. As the opinion of the District Court of Appeal states:

> "There is strong authority for the statement that if it were necessary in order that justice might be done to living parties, the interests of contingent remaindermen in this trust estate could be represented by the trustee. Indeed, the trustee has consistently and vigorously and ably presented to the trial court and to this court its opposition to the judgment approving the compromise and modifying the trust . . .

"It is stated in 120 A. L. R. at p. 886: 'In many cases involving trust estates the trustee, or the trustee together with the holders of other interests, are regarded as sufficiently representing unborn contingent remaindermen.' "[5] [R. p. 609, fols. 618-619.]

In denying its representation of the unborn remaindermen here, the trustee assumes a position analogous to that of the corporation which sought to deny representation of its majority stockholders in *Voller v. Neilston Warehouse Co., supra*, 311 U. S. 531, 537; 85 L. Ed. 322, 326-327, 61 S. Ct. 376 (1941). To paraphrase the language of the opinion there:

> The constitutional issue is here raised for the unborn remaindermen by the trustee, which admittedly itself had notice. This court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions. Yet here the trustee would have us say that it is sufficiently the representative of the unborn remaindermen to raise in their behalf the constitutional issue, but not

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[5]As the California Supreme Court said in *King v. Pauly*, 159 Cal. 549, 555, 115 Pac. 210 (1911):

> "While it is not 'necessary' to the decision of a question by an appellate court that there should be more than one good ground or reason, there may be more than one, and where the court bases its decision on two or more distinct grounds, each ground so specified is, as much as any of the others, one of the grounds, a ruling upon questions involved in the case, and not 'mere *dictum*.' "

To the same effect, see:

Clary v. Rolland, 24 Cal. 147, 150 (1864);
Camron v. Kenfield, 57 Cal. 551, 553-554 (1881);
Pugh v. Moxley, 164 Cal. 374, 377, 128 Pac. 1037 (1912);
Butter v. Wyman, 128 Cal. App. 736, 741, 18 Pac. (2d) 354 (hearing in Supreme Court denied, 1933).

sufficiently their representative to receive notice. We hold that, so far as the constitutional requirement of due process is concerned, it is in this case sufficiently their representative for both purposes.

There is nothing unusual in such a holding. The rights of parties are habitually protected in court by those who act in a representative capacity; an executor or administrator may act for the beneficiaries of an estate; a receiver may represent the collective interests of stockholders, partners, or creditors; a lawyer may appear for his client; and a corporation may represent the collective interests of its shareholders.

3. *The Appointment of a Guardian Ad Litem Gave Actual Representation to the Interests of the Unborn Remaindermen.*

The doctrine of virtual representation alone would have been sufficient to uphold the action of the state court. But here the protective force of that doctrine was augmented through actual representation by a guardian *ad litem* of the interests of the unborn remaindermen.

The necessity of providing a remedy in a suit where, as in the case at bar, it was impossible to bring physically before the court each party to be affected by the Chancellor's decree, gave rise to the well-established equitable concept of jurisdiction in "class suits" and acceptance of the "doctrine of virtual representation."

See:

Smith v. Swormstedt, 16 How. (U. S.) 288, 302-303, 14 L. Ed. 942, 948-949 (1853);

Miller v. Texas & Pacific R. R. Co., supra, 132 U. S. 662, 671-673, 33 L. Ed. 487, 494, 10 S. Ct. 206 (1890).

The guardian *ad litem* is a common-law device born of the necessity that the interests of persons having a legal existence, but not *sui juris*, be represented. The more common instances of persons laboring under legal disability to act are cases involving infants, insane, and other incompetent persons. None of these is *sui juris*. Yet all have a *legal* existence.

Neither is an unborn child *sui juris*. Yet it has *legal* existence, though *en ventre sa mere*, because the law takes cognizance of its rights.[6] By the same token, it is submitted that a contingent remainderman, not yet conceived, but whose rights the law recognizes and protects, has a legal existence—exists within the contemplation of the law—though not *sui juris*.

There is no reason of logic or policy which would admit equity's power to appoint a guardian *ad litem* to represent the interests of an infant in being, and at the same time deny such power with respect to a child *en ventre sa mere* or not yet conceived.[7] The test of the law is *legal*, not actual existence. Manifestly, if things exist within the contemplation of the law, as clearly do the rights of unborn remaindermen, then they are entitled to *legal* representation consistent with their legal recognition.

Correctly, the opinion of the District Court of Appeal states:

> "To aid it in the exercise of its jurisdiction to hear and determine this matter, the court appointed a guardian *ad litem* to represent and protect the interests of the contingent remaindermen. Courts of jus-

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[6]*California Civil Code*, §29.

[7]*Cf. Story, Equity Pleadings* (4th ed., 1848), §70.

tice as an incident of their jurisdiction have inherent power to appoint guardians *ad litem*. (Crawford v. Neal, 56 Cal. 321 (1880); *In re* Cahill, 74 Cal. 52, 15 Pac. 364 (1887); Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968, 971 (1905); Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935).)" [R. p. 608, fol. 617.]

To the same effect, see:

Wilson v. D'Atro, 109 Conn. 563, 145 Atl. 161 (1929);

DuPont v. DuPont, 18 Del. Ch. 316, 159 Atl. 841 1932);

Robinson v. Barrett, 142 Kan. 68, 45 Pac. (2d) 587 (1935);

Lyman v. Lyman, 293 Pa. 490, 143 Atl. 200 (1928).

But the petitioner asserts:

"Consistent with due process of law, living persons may represent unborn and absent parties only in adversary proceedings, not in contractual dealings." (Petitioner's Brief, p. 26.)

In other words, again says the petitioner, the trial court had jurisdiction to litigate, but not to decree a compromise. This unique contention overlooks entirely the fact that the trial court, rather than the guardian *ad litem*, exercises the power to approve or disapprove a compromise. The guardian *ad litem* is but an arm of the court. As the California Supreme Court explained in *Cole v. Superior Court*, 63 Cal. 86, 89 (1883):

"*The court is*, in effect, *the guardian*—the person named as guardian *ad litem* being but the agent to

whom the court, in appointing him (thus exercising the power of the sovereign State as *parens patriae*) has delegated the execution of the trust; and through such agent the court performs its duty of protecting the rights of the infant or incompetent person." (Some italics added.)

Even more surprising is the petitioner's claim that:

"The only reason for the presentation of the compromise to the court was in an attempt to bind these unborn through so-called 'representation' by the very parties who had made this agreement." (Petitioner's Brief, p. 27.)

In making that unfounded statement, the petitioner was clearly forgetful of *Whitten v. Dabney*, 171 Cal. 621, 632, 154 Pac. 312 (1915), where the California Supreme Court pointed out:

"The court and not the guardian *ad litem* has the power to compromise the rights of minors under suitable circumstances."

4. *That the State Court Possessed Inherent Power, Under California Law, to Appoint a Guardian ad Litem to Represent the Interests of the Unborn Remainderman Is No Longer Open to Doubt.*

Section 187 of the California Code of Civil Procedure provides:

"Means to Carry Jurisdiction Into Effect. When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; *and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable*

process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." (Italics added.)

The courts of California have long recognized the inherent "common-law power" of a court of equity to appoint a guardian *ad litem.*

Crawford v. Neal, 56 Cal. 321 (1880);
In re Cahill, 74 Cal. 52, 15 Pac. 364 (1887).

The District Court of Appeal in the case at bar expressly declared it to be the law of California that California courts, "as an incident of their jurisdiction, have inherent power to appoint guardian *ad litem.*"[8] [R. p. 608, fol. 617.]

Thus the trial court was unquestionably authorized to supplement virtual representation by the appointment of a guardian *ad litem* charged with the specific duty of giving actual representation to the interests of the unborn remaindermen.

The petitioner's argument to the contrary, which was repeatedly urged upon the state courts in this cause, refers to statutory procedure for the appointment of guardians *ad litem* pursuant to the provisions of Sections 372 and

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[8]As to the inherent equity powers of California Courts generally, see:

Sanford v. Head. 5 Cal. 297, 298 (1855);
Spreckels v. Hawaiian Com. etc. Co., 117 Cal. 377, 381, 49 Pac. 353 (1897);
Bechtel v. Wier, 152 Cal. 443, 446, 93 Pac. 75 (1907);
City of Pasadena v. Sup. Ct., 157 Cal. 781, 788, 793, 109 Pac. 620 (1910);
Tulare Irr. Dist. v. Sup. Ct., 197 Cal. 649, 660, 667, 242 Pac. 725 (1925);
Times Mirror Co. v. Sup. Ct., 3 Cal. (2d) 309, 331, 44 Pac. (2d) 547 (1935);
Est. of Lankershim, 6 Cal. (2d) 568, 572, 58 Pac. (2d) 1282 (1935).

373 of the California Code of Civil Procedure. Such argument overlooks entirely the fact, noted by the District Court of Appeal, that the inherent common-law power exists independently of any statute.

Moreover, the people of California have declared the public policy of the state with respect to the appointment of guardians *ad litem* to represent the interests of unborn persons. Section 13 of California's Torrens Title Act, an initiative measure, provides:

> "Upon the petition . . . of any person interested in the proceedings, the court shall appoint a disinterested person to act as guardian *ad litem* for minors and other persons under disability and for all persons not in being who may appear to have any interest in or lien upon the land."[9]

Thus, exercise of the inherent power of the California courts to provide independent representation for the interests of those unborn has been declared by the people of California to be not only a permissible practice, but also a desirable practice.

Reasoning by analogy from a statute is, of course, a long and soundly established technique. It is but the age-old principle of the "equity of the statute."[10]

See:

Canfield v. Security-First Nat'l. Bank, 8 Cal. App. (2d) 277, 284-287, 48 Pac. (2d) 133 (1935);
Canfield v. Security-First Nat'l. Bank, 13 Cal. (2d) 1, 13-16, 87 Pac. (2d) 830 (1939).

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[9]*Cal. Stats. 1915*, p. 1932, §13; *Deering's General Laws*, Act 8589, §13.

[10]See: *Stone, The Common Law in the United States* (1936), 50 Harv. L. Rev. 4, 12-13.

Whatever may have prompted its decision on the question, the determinative fact remains that the District Court of Appeal in the case at bar has declared the California law to be contrary to the petitioner's contentions; and the California Supreme Court has added implied approval. Thus any doubt which may have existed previously as to the California law with respect to the appointment of a guardian *ad litem* to represent the interests of unborn persons was effectively set at rest by the decision in this cause.

5. *This Court Will Apply the Law of California as Declared in the Opinion of the District Court of Appeal in This Cause.*

In *West v. American Tel. & Tel. Co.*, 311 U. S. 223, 236-237, 85 L. Ed. 139, 143-144, 61 S. Ct. 79 (1940) this Court said:

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. See Erie R. Co. v. Tompkins, *supra* (304 U. S. 78, 82 L. ed 1194, 58 S. Ct. 817, 114 A. L. R. 1487); Russell v. Todd, *supra* (309 U. S. 293, 84 L. ed. 762, 60 S. Ct. 527).
>
> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

And as Mr. Justice Murphy said in *Stoner v. New York Life Ins. Co.*, 311 U. S. 464, 467, 85 L. Ed. 284, 287, 61 S. Ct. 336 (1941):

> "In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review."

See:

> *Six Cos. of Cal. v. Joint Highway Dist. No. 13*, 311 U. S 180, 188, 84 L. Ed. 114, 117-118, 61 S. Ct. 186 (1941).

Furthermore, this Court will apply the law of California as declared in the opinion of the District Court of Appeal at bar, even though it be assumed *arguendo*, as the petitioner contends, that the opinion declares the law with respect to appointment of guardians *ad litem* to be at variance with prior decisions of the California courts. In the language of Mr. Justice Reed in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543, 85 L. Ed. 327, 330, 61 S. Ct. 347 (1941):

> ". . . the dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry."

6. *The Appointment of a Guardian Ad Litem to Represent the Interests of Unborn Remaindermen Satisfied Every Possible Requirement of Due Process.*

At page 25 of its brief the petitioner urges:

> "The present attempt to innovate a procedure without prior statutory authority . . . is wholly subversive of established principles of due process of law."

From that "obsecure statement" the petitioner seems to argue that due process requires the existence of statutory authority for the appointment of a guardian *ad litem* of unborn persons.

As Mr. Justice White said in *Simon v. Craft*, 182 U. S. 427, 437, 45 L. Ed. 1165, 1171, 21 S. Ct. 836 (1901):

> "But the due process clause of the 14th Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity offered to defend against it."

In the light of that statement it is difficult indeed to perceive wherein the source, whether statutory or common-law, of the trial court's power to appoint the guardian *ad litem* could possibly have any bearing upon whether or not the procedure followed, measures up to the requirements of due process. As this Court observed in *West v. American Tel. & Tel. Co., supra*, 311 U. S. 223, 236, 85 L. Ed. 139, 143, 61 S. Ct. 79 (1940):

> ". . . the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute."

It has already been noted that the decision in the case at bar disposes of any question as to the inherent power of the trial court, wholly apart from statute, to appoint "a guardian *ad litem* to represent and protect the interests of the contingent remaindermen" [R. p. 608, fol. 617]. And it would seem equally clear that the procedure followed meets every requirement of due process.

See:

Loring v. Hildreth, 170 Mass. 328; 49 N. E. 652, 653 (1898);

Copeland v. Wheelwright, 230 Mass. 131, 119 N. E. 667, 669 (1918);

Fisher v. Fisher, 253 N. Y. 260, 170 N. E. 912, 913 (1930);

Gunnell v. Palmer, supra, 370 Ill. 206, 18 N. E. (2d) 202, 205 (1938).

See, also:

Wilson v. D'Atro, supra, 109 Conn. 563, 145 Atl. 161 (1929);

DuPont v. DuPont, supra, 18 Del. Ch. 316, 159 Atl. 841 (1932);

Robinson v. Barrett, supra, 142 Kan. 68, 45 Pac. (2d) 587 (1935);

Young v. Young, 255 Mich. 173, 237 N. W. 535 (1931);

Lyman v. Lyman, supra, 293 Pa. 490, 143 Atl. 200 (1928).

Compare:

Miedreich v. Lauenstein, supra, 232 U. S. 236, 241-242, 246-247, 58 L. Ed. 584, 589, 591, 34 S. Ct. 309 (1914);

Chaloner v. Sherman, 242 U. S. 455, 457-462, 61 L. Ed. 427, 434-435, 37 S. Ct. 136 (1917);

Milliken v. Meyer, 311 U. S. 457, 463-464, 85 L. Ed. 278, 283-284, 61 S. Ct. 339 (1941).

Conclusion.

Every state is free, as Mr. Justice Cardozo said in *Snyder v. Moss,* 291 U. S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330 (1934), "to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The sufficient answer to the petition for certiorari here is that no grounds have been presented and none exist for a review by this Honorable Court. In the last analysis the only ground claimed is that the California courts have decided this cause "in a way probably not in accord" with *Hansberry v. Lee, supra,* 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940), and *Riley v. New York Trust Co., supra,* ..... U. S. ....., 86 L. Ed. (Adv. Ops.) 551, 62 S. Ct. 608 (1942). It is readily apparent that the probability suggested by the petitioner is remote indeed from any actuality.

I therefore respectfully submit that the petition for a writ of certiorari should be denied.

WILLIAM C. MATHES,
Counsel Pro Se as Guardian Ad Litem.

MATHES & SHEPPARD,
PAUL M. GREGG,
GORDON F. HAMPTON,
Of Counsel.